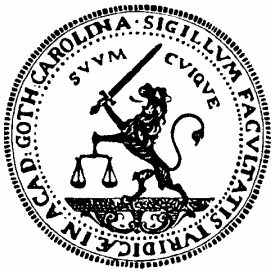


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# Challenges and Responses to the Use of Targeted UN Sanctions

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# Contents

# Summary

The United Nations (UN) sanctions regime was developed during the 1990's as an instrument to induce compliance with Security Council (SC) resolutions. The use of more comprehensive sanctions was criticised since it resulted in collateral damage including humanitarian distress. This brought Members of the UN to convene seminars where UN staff, academics and experts discussed how the sanctions regime could be developed in order to avoid the collateral damage but yet make the sanctions effective.

As the participants agreed on the *need* for sanctions it was also agreed that sanctions can be constructed to be applied on certain targeted actors. These actors can be targeted because they are directly responsible for the imposition of the sanctions or because they are in such a position that sanctions imposed on them can induce compliance. This kind of targeted sanction measure is called "smart sanctions". Targeted smart sanctions has for instance been imposed against individuals and entities associated with Al Qaida, Usama bin Laden and/or the Taliban. These individuals and entities are listed on the so-called Consolidated List which is designated by the SC's Al Qaida and Taliban Sanctions Committee.

The process of this designation and the sanctions imposed on the targeted actors however, where criticised for breaking fundamental human rights, such as the right to a fair trial, since the targeted actors had no possibility to appeal the decision which put the actor on the list. The work to refine the sanctions regime thus continued. Seminars were convened and experts developed recommendations and guidelines. Yet, the process was slow. For instance, the human rights issues were addressed in the Stockholm Process in 2001, but it took several years to bring about notable changes.

This slow process might partially be due to the fact that the UN organisation is large and the process of collaboration between its members can be rather cumbersome. The process might also have suffered from the reform process that the UN organisation has undergone since 1997.

If the deficiencies were excusable to some extent for a period of time they are, in my opinion, not so anymore. The UN has put forward a broad rule of law definition, which in my opinion seriously collides with the situation of the targeted actors. To avoid this definition becoming empty words, the procedures surrounding the listing must be further improved. Most importantly, there must be established an independent judiciary which can counter-balance the political interests and powers which surround this politically infected regime. It must always be taken into account that innocent people *might* be accused. A judicial element in the listing process is required to uphold the rule of law, and to make sure that the rights of the targeted actors are protected.

# Sammanfattning

Förenta Nationernas (FN) sanktionsregim utvecklades under 1990-talet som ett instrument som skulle kunna användas för att framkalla efterlevnad av säkerhetsrådsresolutioner. Tillämpningen av mer omfattande sanktioner kritiserades eftersom de medförde skada på tredje part och humanitär nöd. Det fick medlemmar av FN att sammankalla FN personal, akademiker och experter för att diskutera hur regimen skulle kunna utvecklas för att förhindra dessa indirekta skador men fortsätta vara effektiv.

Deltagarna var överens om *behovet* av sanktioner men också om att de skulle kunna konstrueras så att de enbart tillämpas på särskilt utvalda aktörer. Dessa aktörer kan vara utpekade som föremål för sanktionerna antingen för att de är direkt ansvariga för det som föranledde införandet av sanktionerna eller för att de innehar en sådan roll att sanktioner riktade mot dem kan framkalla efterlevnad av resolutioner. Den här typen av riktade sanktioner kallas för ”*smart sanctions*”. Riktade sanktioner har exempelvis införts mot individer och grupperingar som misstänks ha samröre med Al Qaida, Usama bin Laden och/eller talibanerna. Dessa individer och grupperingar är listade på den s.k. konsoliderade listan, angiven av Säkerhetsrådets Kommitté för Al Qaida och Taliban Sanktioner.

Listningsprocessen samt de sanktioner som tillämpades på dessa utpekade aktörer kritiserades dock för att bryta mot mänskliga rättigheter, bland annat rätten till en rättvis rättegång eftersom de utpekade aktörerna inte hade någon möjlighet att överklaga beslutet som satte dem på listan. Arbetet med att förbättra regimen fortsatte således. Seminarier hölls och experter lade fram rekommendationer. Trots detta gick processen långsamt. Problemen kring rättigheterna diskuterades exempelvis under Stockholmsprocessen 2001 men det tog flera år innan märkbara förändringar skett.

Den långsamma processen kan delvis bero på att FN är en stor organisation och att samarbetsprocessen mellan medlemsstaterna kan vara ganska besvärlig. Processen kan också ha lidit av den reform som FN undergått det senaste decenniet.

Om bristerna gick att ”ursäkta” under en viss tid så kan man, enligt min mening, inte det längre. FN har lagt fram en bred definition av ”the rule of law” som, enligt min mening, allvarligt kolliderar med den situation som råder för de utpekade aktörerna. För att undvika att den här definitionen bara innehåller tomma ord måste procedurerna kring listningsprocessen ytterligare förbättras. Framförallt måste en oberoende domstol etableras som kan väga upp de politiska intressenter som omgärdar den här politiskt infekterade regimen. Man måste alltid ta hansyn till att oskyldiga människor *kan* bli anklagade. Ett juridiskt element i listningsprocessen krävs för att upprätthålla rättssäkerheten och skydda de utpekade aktörernas rättigheter.

# Abbreviations

| | |
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| CFI | Court of First Instance |
| ECJ | European Court of Justice |
| ECOSOC | Economic and Social Council |
| GA | General Assembly of the United Nations |
| HRCil | Human Rights Council |
| HRCion | Commission on Human Rights |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural rights |
| ICJ | International Court of Justice |
| NGO | Non-governmental Organisation |
| OAS | Organisation of American States |
| OHCHR | Office of the High Commissioner for Human Rights |
| SC | Security Council of the United Nations |
| SG | Secretary-General |
| UN | United Nations |
| UDHR | Universal Declaration of Human Rights |
| UNGA | United Nations General Assembly |
| UNITA | União Nacional para a Independência Total de Angola |
| UNMD | United Nations Millennium Declaration |
| UNS | United Nations Secretariat |
| UNSC | United Nations Security Council |

# 1 Introduction

When the Cold War ended, the United Nations (UN) was free from the political tensions that had restrained it during the war, and the UN Security Council (SC) could more freely use the great powers bestowed upon it in 1945. Acting within these powers, the SC developed the sanctions instrument to become a routine action imposed to induce compliance with SC decisions without having to use military force. Sanctions were often used during the 1990's, and they are still seen as a vital tool at the disposal of the SC for dealing preventively with threats to international peace and security. However, due to collateral humanitarian suffering caused by more or less comprehensive sanctions, invoked notably on Iraq during the early 1990's, the use of sanctions became criticised. From this criticism emerged so-called *smart* sanctions, *targeted* at designated individuals and entities. By targeting, the sanctions are supposed to be "smarter" as they reduce the humanitarian impact caused by comprehensive sanctions.

The travel ban and the freezing of the assets of designated individuals and entities associated with Al-Qaida, Usama bin Laden and/or the Taliban are two examples of targeted sanction measures imposed by the SC. However, the consequences of these imposed sanctions measures have led to a lively debate on the use of targeted sanctions, as well as on the importance of protecting fundamental human rights and paying full respect to the rule of law, not only in times of peace but also in times of war and international security crisis. The debate especially grew in force in Europe due to the European Union's decision to implement the SC resolutions, concerning individuals and entities associated with Al Qaida, Usama bin Laden and/or the Taliban, within the Union through a number of EC-regulations. By using the Consolidated List as designated by the Al Qaida and the Taliban Sanctions Committee which was established by the SC in 1999, the EU created its own list of individuals and entities for freezing of their assets.

One of these individuals was Yassin Abdullah Kadi, a Saudi Arabian citizen with business activities within the EU. Mr. Kadi appealed to the Court of First Instance (CFI) for *inter alia* annulment of Council Regulation (EC) No 881/2002, which states that "*a natural or legal person, group or entity designated by the Sanctions Committee*" shall be subject to assets freeze. The CFI delivered its judgment on 21 September 2005, in which it declares that there is no need to adjudicate on the application for annulment, whereupon the Court dismissed the action.[1] In the reasoning of the decision, the Court states that the SC resolutions at issue fall outside the ambit of the Court's judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of EC-law. However, the Court reason that it is empowered to check, indirectly, the lawfulness of the resolutions of the SC in question with regard to *jus cogens*, which it defines as "*a body of higher rules of public international law binding on all*

[1] Case T-315/01 *Kadi v. Council and Commission*, [2005] ECR II-3649, para. 294.

*subjects of international law, including the bodies of the United Nations, and from which no derogation is possible*".[2] The Court considered that the applicant's fundamental rights had *not* been infringed by the contested regulation, measured by the standard of universal protection of the fundamental rights of the human person covered by *jus cogens*.[3]

Kadi appealed to the European Court of Justice (ECJ), and the Court gave its judgment on 3 September 2008, in the joined cases of Kadi and of the Al Barakaat International Foundation.[4] The two main questions for the Court to deal with were whether the court had jurisdiction to judge on the implementation of the UN resolutions leading up to the contested regulation, and, if so, whether the sanctions measures constituted a breach of fundamental human rights.

The ECJ notes in its decision that the UN Charter does not impose the choice of a particular model for implementation of SC resolutions adopted under chapter VII of the UN Charter, since they are to be given effect in accordance with the procedure applicable in the domestic legal order of each Member of the UN. The UN Charter leaves a free choice for the Members among the various possible models for transposition of those resolutions into their domestic legal order. The Court therefore concludes that a judicial review of the internal lawfulness of the contested regulation, in the light of fundamental freedoms, cannot be excluded by the fact that the measure is intended to give effect to a SC resolution adopted under Chapter VII of the UN Charter.[5] The Court also stated that it must be held that the rights of the defense, in particular the right to be heard, and the right to effective judicial review of those rights, have been "*patently not respected*".[6] Consequently, the Court set aside the judgment of the CFI in both cases, and annulled regulation No 881/2002 in so far as it concerned Mr. Kadi and the Al Barakaat International Foundation. The Court decided however to maintain the effects of the regulation for a period that was not to exceed three months. This time limit was set to allow the European Council to remedy the infringements found.[7]

This case brought attention to the impossibility and sensitivity of reviewing a SC decision, but also to the material and procedural issues surrounding the sanctions. The use of sanctions, as an instrument used in order to induce compliance with SC decisions, when pacific means fail to succeed in settling the dispute in question, but where military response is either inappropriate or impossible, is frequent but contested. The process of listing individuals and entities subject to sanctions such as the assets freeze has been criticised for not complying with human rights, specifically the right to

[2] *Kadi*, paras. 225 – 226.
[3] Ibid., paras. 237-238.
[4] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission*, [2008], ECR I-0000.
[5] Ibid., paras. 298-299.
[6] Ibid., paras. 334.
[7] Ibid., para. 375 and 380.

be heard and the right to a fair trial. In addition, as Chesterman et al. notes, the notion of respect for the rule of law internationally is at the heart of the Charter, and at the heart of the foreign policy of most countries.[8] Former Secretary General (SG) Kofi Annan stated in 2005, regarding human rights, that our declared principles and our common interest demand that we move from an area of legislation to an area of implementation. While regarding the rule of law, he declared that a mere concept is not enough; new laws must be put into place, old ones must be put into practice and the institutions must be better equipped to strengthen the rule of law.[9] Kofi Annan also stated that future sanctions regimes must be structured carefully to minimize the suffering caused to innocent third parties.[10]

## 1.1 Subject and Purpose

The subject of this thesis is the use of targeted sanctions. While the ECJ rulings of Kadi and Al Barakaat further infused the debate on the use of targeted sanctions with important legal issues concerning the implementation of SC resolutions imposing targeted financial sanctions, and on the issue of the right to effective remedy, they also draw further attention to the use of targeted sanctions in general, and to the wide powers bestowed upon the SC. The criticism concerns *inter alia* the fact that the SC's decisions are not subject to any kind of judicial review. It was nonetheless under these conditions that the SC was established, and the great powers were given for a reason, namely for preventing the recurrence of the devastating world wars. However, this was more than 50 years ago and it has been questioned whether the members of the UN are still willing to allow the SC to act with this wide discretion and without the possibility of a judicial review of its decisions, or if the use of targeted sanctions in combating terrorism has led to an erosion of trust in the SC. However, in addition to improvements of the listing process, the UN has undergone a reform process during the last decade. The question is whether the UN and the SC has managed to rebuild the trust which has, arguably, been crumbling lately.

The overall purpose of this thesis is to describe the development of the use of sanctions, and to analyse the developments with regard to the rule of law, particularly concerning the sanctions measures imposed on individuals and entities associated with Al Qaida, Usama Bin Laden and/or the Taliban. I will also try and determine what view the international community has on the use of targeted sanctions.

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[8] Chesterman, Simon; Franck, Thomas M. and Malone, David M. *Law and Practice of the United Nations – documents and commentary*, Oxford University Press, 2008, p. 20.
[9] See 6.2.2.
[10] In *Larger Freedom: Towards development, security and human rights for all*, UN Doc. A/59/2005, para 110, available at http://www.un.org./largerfreedom.

## 1.2 Method

The area of legislation concerning sanctions and their implementations, as well as the debate surrounding the issue, is both vast and political. My aim is, however, to make a legal analysis of the development of the use of targeted sanctions with regard to the rule of law and the protection of human rights. However, the political nature of the UN and international legal regimes must be stressed. Undeniably, it proves unattainable to keep the analysis strictly legal.

The thesis is largely descriptive, as my intention is to give the reader a greater understanding of the developments and use of targeted sanctions, and in order to lay a foundation for the concluding analyses.

## 1.3 Delimitations

Considering the limited scope of this thesis, I had to limit my study. I work, for instance, with the assumption that the reader has some knowledge of the human rights issues concerning the use of targeted sanctions, especially concerning the Al Qaida, and Taliban Sanctions Committee. I will not describe the specific human rights provisions in detail, or the implementation processes of SC resolutions. I will instead focus on the development - how the UN members and the UN Organisation have acted in order to refine the use of targeted sanctions, and try to determine what view the international community has on the use of targeted sanctions.

## 1.4 Materials

There is a vast amount of materials concerning both the use of sanctions and the rule of law. In order to describe and analyse the development of the sanctions regime I have studied the main documents and reports regarding sanctions provided for by the UN and its Members. In order to analyse the development of the regime I have also studied reports regarding the reform process that the UN has undergone as well as reports and articles regarding the rule of law. In order to describe the development of the sanctions regime I chose to study three books as well as SC and GA resolutions.

Simon Chesterman, who has written the first book *Law and Practice of the United Nations, Documents and commentary*, has also written several articles on the rule of law that I have used for my rule of law discussion. Chesterman is a Global Professor of Law and Director of the New York University of Singapore Faculty of Law and has written widely on international institutions, international criminal law, human rights, the use of force, and post-conflict reconstruction. Chesterman co-wrote the book together with Thomas M. Franck and David M. Malone. Franck is Emeritus Professor of Law at New York University School of Law and Malone is Canada's former Ambassador to the United Nations. I chose the book,

which are both a casebook and a textbook, because experts of this area of legislation worldwide recognise it. It combines primary materials with expert commentary in order to demonstrate the interaction between law and practice in the UN organisation.

The second book that I have used is the textbook *International Law*, by Malcolm N. Shaw. Shaw is a Professor of Law at the University of Leicester, and a practising barrister. I chose this textbook because of its thoroughness, and its international recognition.

The third book, *Human rights – between idealism and realism*, is written by Christian Tomuschat, who is Professor of Constitutional and International Law at Humboldt University in Berlin. I chose this textbook because it provides a multidimensional overview of human rights

Regarding the refinement of sanctions, I chose to study the reports of the seminars that have been held by UN members on the issues of targeted sanctions, as well as another International Study made by the Watson Institute Targeted Sanctions Project. I have also studied the UN report of the symposium held by the UN on the enhancing of the implementation of SC sanctions. Since the UN can be seen as both an Organisation and as its members, I consider it of interest to investigate what initiatives have been taken specifically by the members and what has been initiated by the organisation. I have also studied a report on targeted sanctions made by Iain Cameron, professor at the department of law at Uppsala University in Sweden, for the Swedish Government.

For my rule of law discussion, I have studied articles by Chesterman, but also an article by Brian Tamanaha who is Professor of Law at St John's University, USA. I chose to study Tamanaha because he is the renowned author of a number of books and articles on jurisprudence including studies of the rule of law and he has given lectures all over the world.

For the discussion on the rule of law, I also studied the part of Erik Wennerström's thesis *The Rule of Law and the European Union* in which he deals with the rule of law. I included this since he makes some interesting comments on the development of a rule of law definition in regard specifically to the UN. Wennerström, *LL.M.* and Director for International Affairs at the Police Division of the Swedish Ministry of Justice, and active at the University of Uppsala, has a background with the European Commission and the Swedish Ministry for Foreign Affairs, and has, for instance, been an adviser to countries seeking membership of the EU on rule of law matters.

Finally, I have also studied numerous reports of the Secretary-General of the UN. I studied the main documents regarding the reform and the rule of law. Information on the terrorist committees I accessed on the UN website. Finally, I have studied relevant international treaties.

## 1.5 Outline

Since the use of targeted sanctions is interconnected with the protection of human rights and the UN conception of the rule of law, I describe the establishment of the UN and the UN organs in the light of the protection of human rights in Chapter 2. The protection of human rights by the UN is debatable, especially regarding the human rights by which the SC is considered bound. In Chapter 3, I deal with the rule of law. The rule of law is very much discussed by legal theorists, and even though there are agreements regarding its existence, there are wide disagreements regarding its substance. The first part of the chapter is therefore a discussion on the substance of the rule of law in general, whereas the second part deals with the UN conception of the rule of law.

I describe the development of the sanctions regime in Chapter 4 and in Chapter 5 I deal with the specific actions that have been taken in order to refine the use of targeted sanctions. I also believe it is of interest for the reader to consider the reform process that the UN has undergone during the last decade in order to gain a greater understanding of the development of the sanctions regime. I therefore give an account of this in Chapter 6. Chapter 7 concerns the Consolidated List of individuals and entities associated with Al Qaida, Usama Bin Laden and/or the Taliban, and how the processes of listing, de-listing, etc. are construed today. In the last chapter, I analyse the developments and use of sanctions regard to the rule of law and human rights (with focus on the process of listing).

# 2 Organs of the UN and the protection of human rights

Created in the aftermath of the Second World War, the United Nations (UN) emerged in extraordinary circumstances. An international system for cooperation within the international community was created in order to prevent the recurrence of devastating wars. The purposes of the UN organisation are set out in Article 1 of the Charter of the UN (hereinafter the Charter) as follows:

1. To *maintain international peace and security*, and to that end: to take effective collective measures for the *prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace*, and to bring about by peaceful means, and *in conformity with the principles of justice and international law*, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and *in promoting and encouraging respect for human rights and for fundamental freedoms* for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends. (My italics)

Even though the primary objective of the organisation is to maintain international peace and security, the Charter recognizes the need to promote and encourage respect for human rights and fundamental freedoms. Some countries even wished to establish a complete list of human rights for inclusion in the Charter. However, as it would require thorough considerations to establish a definition of such rights, it would prove impossible to reach an agreement on this so.[11] It was instead only established that to promote and encourage respect for human rights and fundamental freedoms belonged to the core purposes of the Organisation. This has been reaffirmed several times during the history of the UN.[12]

[11] Tomuschat, Christian *Human Rights – between idealism and realism*, 2nd edition, Oxford University Press, 2008, p. 23.
[12] See e.g. statement of the Secretary-General Kofi Annan to the GA in 2005 concerning the report *In Larger Freedom: Towards development, security and human rights for all*, UN Doc. A/59/2005, available at http://www.un.org./largerfreedom.

## 2.1 "The International Bill of Rights"

In accordance with Article 68 of the Charter, the Economic and Social Council (ECOSOC), one of the principal UN organs[13], set up the Commission on Human Rights (HRCion) in 1946. One of the first tasks for the HRCion was to come up with a proposal for a bill of rights. The General Assembly (GA) adopted the proposed draft as the *Universal Declaration on Human Rights* (UDHR) on 10 December 1948. The declaration is a form of recommendation intended to exert moral and political influence on member states. It was supposed to be the foundation for the creation of a more detailed convention with binding force, but as the ideological divisions of the Cold War came to influence the debates on human rights, a comprehensive UN convention on human rights was never established. The provisions were instead divided into two treaties approved by the GA in 1966 - the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Furthermore, even though the UDHR was not intended to be a binding instrument, it is now frequently regarded as reflecting customary international law.[14] In the *United Nations Millennium Declaration* (UNMD), established at the Millennium Assembly in September 2000 at the UN headquarters in New York, and adopted by the GA the same month, the heads of State and Government stated that they would spare no effort to promote respect for all internationally recognized human rights and freedoms. They therefore resolved to fully respect and uphold the UDHR, as well as to strive for the full protection and promotion in all countries of civil, political, economic, social and cultural rights for all.[15]

## 2.2 The Security Council

The Security Council (SC) was established in accordance with Article 7 of the Charter as one of the principal organs of the Organisation. The Council consists of one representative each from fifteen of the UN members, whereof five are permanent members and ten are non-permanent members elected for a term of two years.[16] The SC acts on behalf of the members of the organisation and its decisions are binding upon all members.[17] The SC is entrusted with the responsibility for the maintenance of international peace and security, and is not an organ established for the protection of human rights. However, in discharging the duties conferred upon it, the SC shall act in accordance with the purposes and principles of the organisation.[18] According to Tomuschat, the prevention of war constitutes indirect protection of human rights. The SC therefore has an indirect concern for

[13] Article 7 of the UN Charter.
[14] Chesterman, Franck and Malone, *supra note* 8 p. 448 ff.
[15] *United Nations Millennium Declaration*, UN Doc. A/Res/55/2, available at http://www.un.org/millennium/summit.htm .
[16] Article 23 of the UN Charter.
[17] Article 24 and 25 of the UN Charter.
[18] Article 24 of the UN Charter.

human rights issues. He argues that the adoption of Resolution 554(1984), in which the SC "*strongly rejects and declares null and void*" the new Constitution of South Africa, is one of the most significant SC decisions showing this concern. As the constitution *per se* did not have a direct link to international peace and security, the situation in South Africa as a whole was considered to constitute a threat to international peace and security.[19] Thus, there is a connection between the prevention of war and the protection of human rights. Arguably, the SC is bound by human rights protected by the Charter and human rights that have passed into general international law. Cameron argues that the UDHR in particular, reflects the human rights protected by the Charter and the human rights that have passed into general international law. Furthermore, the core of ICCPR and ICESCR should also be seen as representing human rights protected by the Charter, and which should bind the SC.[20]

## 2.3 The General Assembly

Established in accordance with Article 7 of the Charter as one of the principal organs of the Organisation, the GA is the parliamentary body of the UN. Article 9 of the Charter establishes that the GA shall consist of the maximum number of five representatives of each Member State. The GA may discuss any question or any matters within the scope of the Charter or relating to the powers and functions of any UN organs provided for in the Charter. The GA may also make recommendations to the Member States and/or to the SC on any such question or matters. However, when the SC is exercising the functions assigned to it in respect of any dispute or situation, the GA shall not make any recommendations with regard to that dispute or situation unless the SC so requests.[21] In accordance with Article 13 of the Charter, the GA has the power to initiate studies and make recommendations regarding human rights. Human rights issues on the GA's agenda can originate in e.g. ECOSOC reports. The ECOSOC can call for international conferences on human rights matters, and it can make recommendations on human rights and draft conventions for the GA. The GA has several subsidiary organs and committees that deal with human rights such as the Social, Humanitarian and Cultural Committee, also known as the GA's Third Committee.[22]

## 2.4 The Secretariat

The Secretariat consists of the Secretary-General (SG) and such staff as the organisation requires. It was established in accordance with Article 7 of the Charter as one of the principal organs of the organisation. The GA, upon the recommendation of the SC, appoints the SG. The SG is the chief officer of

[19] Tomuschat, *supra note* 11, p. 154 f.
[20] Cameron, Iain *Targeted Sanctions and Legal Safeguards*, Report to the Swedish Foreign Office, October 2002, p. 22, electronic copy available at http://www.smartsanctions.se.
[21] Articles 10 and 12 of the UN Charter.
[22] Shaw, Malcolm N. *International Law*, 5th edition, Cambridge University Press, p. 282.

the organisation, and acts in that capacity in all meetings of the principal organs of the organisation, except the International Court of Justice (ICJ).[23] The SG has a number of additional tasks entrusted to him by the Charter and other UN Organs, such as correspondence between the SC and the GA. The SG may also bring to the attention of the SC any matter that, in the opinion of the SG, may threaten the maintenance of international peace and security.[24]

## 2.5 Treaties and Bodies on Human Rights

SG Kofi Annan stated in 2005 that change was needed if the UN was to sustain long-term, high-level engagement on human rights issues, across the range of the organisation's work, and therefore suggested a transformation of the HRCion.[25] Consequently, the Human Rights Council (HRCil) was established in 2006 to replace the HRCion. The HRCil is together with the GA the main actors entrusted with the task of promoting and protecting human rights.[26]

The Office of the High Commissioner for Human Rights (OHCHR), established by the GA in 1993, enjoys a unique and extremely wide mandate from the international community to promote and protect all human rights. The OHCHR is part of the UN Secretariat and has the task of ensuring the implementation of the decisions of the political bodies.[27]

An international system, based on the various conventions on human rights together with the UDHR, has been developed to monitor the level of respect for human rights across the globe since the establishment of the UDHR. The instrument-based system relies on a committee system by which the states are scrutinized, the main actor of which is the HRCil.[28] The other bodies of the system are the seven human rights treaty bodies, which were not created under the Charter, but are part of the broader UN system. The ICCPR established the Human Rights Committee, and the ICESCR established the Committee on Economic, Social and Cultural Rights. The other five bodies are the Committee on Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, the Committee against Torture and the Committee on the Rights of the Child and the Committee on Migrant Workers. These bodies monitor implementation of the core international human rights treaties.[29] Conventions of great importance are *inter alia* the International Convention on Elimination of All forms of Racial Discrimination (CERD) established in 1965 and the

[23] Article 97 and 98 of the UN Charter.
[24] Articles 12 and 98-99 of the UN Charter.
[25] *In Larger Freedom: towards development, security and human rights for all*, UN Doc. A/59/2005, para. 141 and 146, available at http://www.un.org./largerfreedom.
[26] Tomuschat, *supra note* 11, p. 134.
[27] Ibid., p. 153.
[28] Wennerström, Erik *The rule of law and the European Union*, Iustus Förlag AB, Uppsala, 2007, p. 24.
[29] Chesterman, Franck and Malone, *supra note* 8, p. 449 f.

Convention on the Elimination of All forms of Discrimination against Women (CEDAW) established in 1979. Further, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), established in 1984, and the Convention on the Rights of the Child (CRC) established in 1989.[30]

[30] Tomuschat, *supra note* 11, p. 31 ff.

# 3 An international rule of law?

There are disagreements among theorists regarding the rule of law. What does the concept really mean? What are its elements and requirements? What are the benefits and/or limitations? Is it a universal good? These are some of the complex questions that legal theorists have tried to answer. Tamanaha gives guidance to the concept in his paper "*A concise guide to the rule of law*", in which he gives guidance to the concept with starting-point in the *narrow* definition of the rule of law. According to Tamanaha, the narrow definition of the rule of law states that the rule of law, at its core, requires that government officials and citizens are bound by, and act consistent with, the law. The law must be prospective, public, general, clear, stable and certain, and applied to everyone according to its term. This definition is the *formal* definition of the rule of law, and it represents a common base for most of the various competing definitions, which includes e.g. reference to fundamental rights and democracy. The latter definitions have a *substantive* element, as they make a reference to the content of the laws by which officials and citizens are bound according to the formal concept of the rule of law.[31]

Two *functions* of the rule of law are, according to Tamanaha, to impose legal restraints on government officials (by requiring compliance with existing law and by imposing legal limits on law-making power), and to maintain order and coordinate behaviour and transactions among citizens.[32]

He further describes *benefits* of the rule of law. Tamanaha states that the rule of law enhances certainty, predictability, and security, between citizens and the Government, and among citizens; that it restricts discretion of Government Officials, reducing willfulness and arbitrariness; that a peaceful social order is maintained through legal rules; and that economic development is facilitated by certainty, predictability, and security. Finally, he notes the fundamental justice of the requirements that the rules must be applied equally to everyone according to their terms.[33]

Concerning the basic *elements* in establishing the rule of law Tamanaha states that there must be a widely shared orientation within a society that the law does rule and should rule. Further, an institutional, independent judiciary is crucial for the above-mentioned functions of the rule of law. It is also necessary to have a well-developed legal profession and legal tradition committed to upholding the rule of law.[34]

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[31] Tamanaha, Brian *A concise guide to the rule of law*, St John's University, 2007, p. 2 f. electronic copy available at http://ssrn.com/abstract=1012051.
[32] Ibid., p. 3 ff.
[33] Ibid., p. 7 ff.
[34] Ibid., p. 13 ff.

Tamanaha also makes some comment on the substantive definitions with reference to democracy and human rights, and he notes that nothing within the narrow definition of the rule of law requires democracy, or a regime of human rights. He states, "*The rule of law, at base, is about government officials and citizens acting in accordance with legal rules. This is an essential idea with manifold implications, but it cannot solve every problem or be the repository of everything valuable.*" [35]

However, a fair number of scholars who have written about the rule of law do include democracy and/or human rights as integral parts of the rule of law. These are the *substantive* definitions of the rule of law, and the narrow definition is a common ground. Working on the supposition of the narrow definition, Tamanaha states that the fact that the rule of law does not in itself require democracy, respect for human rights, or any particular content in law, is one reason to "*be wary of the rule of law*". He states, "*Developing the rule of law does not insure that the law or legal system is good or deserves obedience.*"[36] Tamanaha also notes that states and governments have abused the law while claiming to embrace and abide by the rule of law. As such, the rule of law is a powerful legitimising ideal, and there is reason to be wary of the talk about the rule of law.[37]

Whether the rule of law has an internationally recognised definition, Chesterman states, "*the rule of law is almost universally supported at the national and international level.*" He continues, "*the extraordinary support for the rule of law in theory, however, is possible only because of widely divergent views of what it means in practice.*"[38] Chesterman proposes a core definition of the rule of law as a political ideal in his paper "*An international rule of law?*" He argues that the "*applicability [of the rule of law] to the international level will depend on that ideal being seen as a means rather than an end, as serving a function rather than defining a status*".[39] Thus, Chesterman calls attention to the *functions* of the rule of law.

Chesterman describes a high degree of consensus on the *virtues* of the rule of law, but a dissension as to its *meaning*, the former being dependant on the latter.[40] He observes that the term at times is used as a synonym to legality, and that it sometimes appears to import broader notions of justice, while in other contexts it refers neither to rules nor to their implementation but to a kind of political ideal for society as a whole. Chesterman states, "*To conceive of the rule of law in a manner coherent across the many contexts in which it is invoked requires a formal, minimalist understanding that does not seek to include substantive political outcomes – democracy, promoting*

[35] Tamanaha, *supra note* 31, p. 18.
[36] Ibid.
[37] Ibid., p. 17 ff.
[38] Chesterman, Simon *An international rule of law?* New York University, 2008, p. 1 electronic copy available at http://ssrn.com/abstract=1081738 .
[39] Ibid., p. 1.
[40] Ibid., p. 2.

*certain human rights, redistributive justice or laissez-faire capitalism, and so on – in its definition*."[41] Whereas an agreement on the meaning of the rule of law requires a formal conception, an agreement on how that content is applied requires a *functionalist* understanding of its use.[42] Chesterman states that the rule of law promotion tends to be presented as a form of technical assistance, "*a formal theory looking to the architecture of a legal system rather than to the content of its laws*".[43] He continues to argue that the rule of law assistance is supported because it is perceived to bring certain outcomes, such as human rights promotion.[44]

Chesterman includes *three elements* in the rule of law; the power of the State may not be exercised arbitrarily; the law must apply also to the sovereign and instruments of the State, with an independent institution such as a judiciary to apply the law to specific cases; and the law must apply to all persons equally, offering equal protection without prejudicial discrimination. He summarizes these elements as *a government of laws, the supremacy of the law, and equality of the law*.[45]

The rule of law has been promoted at the international level through treaties and international organizations, such as the UN. For instance, it has been advocated through human rights treaties as the foundation of a rights-respecting State. Chesterman notes also that the SC has promoted the rule of law as a form of conflict resolution. He states, however, "*The fact that the rule of law is used to promote what some include within a substantive conception of the rule of law should not be confused with a reversion [...] to such a substantive understanding. Rather, the rule of law is best understood in the core sense [...] and then examined with reference to the various purposes (including the achievements of specific political ends) to which it is put*".[46]

## 3.1 The UN and the rule of law

The preamble of the UDHR states: "*it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law*".[47]

That peace and security are to be promoted by strengthening the rule of law, human rights and democracy, were recognized at the Millennium Assembly where the Members resolved to strengthen the respect for the rule of law along with all internationally recognized human rights and fundamental

[41] Chesterman, *supra note* 38, p. 3.
[42] Ibid., p. 3.
[43] Ibid., p 14.
[44] Ibid., p. 14.
[45] Ibid., p. 15.
[46] Ibid., p. 16 f.
[47] *The Universal Declaration of Human Rights*, UN Doc. A/RES/217 (III), available at http://www.un.org/en/documents/udhr/.

freedoms.[48] Wennerström notes in his thesis "*The Rule of Law and the European Union*", that this is to be done notably through complying with the decisions of the ICJ and he states that the normative order, to which reference is made, as the UN's rule of law conception operates, is the order of international law, as that is where the ICJ has jurisdiction.[49] Wennerström also notes that the UN at the time of the establishment of the UDHR did not have jurisdiction over the parties concerned with human rights (individuals and the states in which they reside), and that the UDHR therefore refers to other normative orders. The national normative orders of states are obliged to observe human rights vis-á-vis their citizens through treaty commitments or through the gradual integration of human rights into obligations under general international law, and especially through every Members obligation under the UN Charter to promote human rights.[50] Wennerström argues that the rule of law has been seen as a basis for the UN's very existence. There is however no specific body entrusted with safeguarding the rule of law.[51]

Democracy, human rights, and the rule of law are recognized by the Charter as priorities for the UN, and Wennerström states that all three priorities are regarded as "*mutually connected and naturally interdependent*".[52] SG Kofi Annan repeated these priorities in his report "*In Larger Freedom – towards development, security and human rights for all*", but there are also specific reports on the rule of law priority itself; the report "*Strengthening the rule of law*" was presented in 2002, and the report "*The rule of law and transitional justice in conflict and post-conflict societies* was presented in 2004.[53] Wennerström notes that none of these reports are binding on any entity other than possibly the Secretariat. He notes, however, that they carry a persuasive normative value that should not be underestimated. They inspire the Secretariat when it drafts reports and decisions of the SC, and they influence other UN bodies in their monitoring and technical assistance activities.[54]

[48] *United Nations Millennium Declaration*, UN Doc. A/Res/55/2, available at http://www.un.org/millennium/summit.htm.
[49] Wennerström, Erik *supra note* 28, p. 23.
[50] Ibid., p. 24.
[51] Ibid., p. 24 - See note 7. It has however been suggested that "*A specific Rule of Law Assistance Unit*" should be established within the Secretariat in order to better coordinate measures to restore and strengthen the rule of law in conflict-stricken areas.
[52] Ibid., p. 24, and Article 1 of the UN Charter.
[53] See *Strengthening the rule of law*, UN Doc. A/57/275 and *The rule of law and transitional justice in conflict and post-conflict societies* UN Doc. S/2004/616.
[54] Wennerström, Erik *supra note* 28, p. 24 f.

### 3.1.1 Strengthening the rule of law

The OHCHR's mandate and responsibility to coordinate the activities of the UN system in the areas of human rights, democracy, and the rule of law are emphasised in a report of the SG, called "*Strengthening the rule of law*". The report recalls the GA's resolution 55/99 in which the GA affirmed the role of the OHCHR and welcomed the ongoing cooperation in this regard. The report states that the OHCHR has made the promotion of the rule of law a priority in its technical cooperation programmes, recognizing the link between the rule of law and respect for human rights. It states that key elements of the rule of law include an independent judiciary, independent national human rights institutions, defined and limited powers of Government, fair and open elections, a legal framework protecting human rights and guidelines governing the conduct of police and other security forces that are consistent with international standards. The report notes that the number of States requesting assistance in fortifying and consolidating the rule of law has continued to grow and can be considered an indicator of the growing awareness of the importance of the rule of law.[55] In the conclusion of the report it is stated, "*The promotion of the rule of law is predicated on the linkage between the promotion and protection of human rights and the rule of law, and on the recognition of these as the indispensable foundations for sustainable democracy*".[56]

One of the chapters of the report deals with "*states of emergency*". A domestic constitutional and legal system that lists and limits emergency powers and permissible derogation from human rights during a state of emergency is an essential element of any framework for strengthening the rule of law. This system must be consistent with the provisions of article 4 of the ICCPR.[57] Article 4 §1 states, "*In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.*"[58]

Some fundamental rights are, however, excluded from this exception. These include the right to life; freedom of thought, conscience and religion; freedom from torture, inhuman or degrading treatment; and the principles of non-retroactivity and precision of criminal law except where subsequent legislation imposes a lighter penalty.[59]

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[55] *Strengthening the rule of law*, UN Doc. A/57/275, 1-4.
[56] Ibid., para. 44.
[57] Ibid., para 16.
[58] *International Covenant on Economic, Social and Cultural Rights*, UN Doc. A/RES/2200 (XXI), Article 4 §1, available at http://www.un.org/en/documents/index.shtml.
[59] Articles 6, 7, 8 (paras. 1 and 2), 11, 15, 16 and 18 of the ICCPR.

The report states that "*human rights law strikes a balance between legitimate national security concerns and the protection of fundamental freedoms. It concedes that derogation from a number of rights may be permissible in times of national emergency.*"[60] However, Article 4 of the ICCPR subjects such derogations to substantive and procedural safeguards regarding the declaration and implementation of a state of emergency. The Report states that these safeguards include the following:

- "*The nature of the emergency must threaten the life of the State;*
- *The existence of a state of emergency must be officially declared;*
- *The measures adopted are necessary to the extent strictly required by the exigencies of the situation;*
- *The derogations are not incompatible with the State's other international law obligations;*
- *The derogating State notifies other States, trough the Secretary-General of the UN, of the provisions it derogated from and the reason for this step, as well as of the date when the emergency has ceased to exist.*" [61]

The Human Rights Committee (HRC) provides and authoritative guidelines for the interpretation of article 4 of the ICCPR and the permissibility of derogations from the provisions of the Covenant in its general comment No. 29, adopted in 2001.[62] The report recalls the Committee's observation in the comment regarding derogations and how they are only permitted in the special circumstances defined in human rights law. The circumstances must be exceptional and carefully weighed, and the derogation must be strictly limited in time and substance, and be subject to regular review. Finally, the process of adopting derogations must be consistent with established national and international procedures. The Committee has also underlined that, derogations from the ICCPR are admissible only if and to the extent that the situation constitutes a threat to the life of the nation, even in time of armed conflict. Regarding the right to a fair trial, the Committee underlined that, as the right to a fair trial is explicitly guaranteed under international humanitarian law, especially the Geneva Conventions, during armed conflict, derogation from fair trial guarantees cannot occur during other emergency situations. The Report further recalls the Committees statement regarding requirements where exceptional circumstances allow for the limitation of some rights for legitimate and clearly defined situations other than emergencies. The principles of necessity and proportionality must always be taken into consideration, and the measures must be appropriate and the least intrusive available to achieve the objective.[63]

[60] *Strengthening the rule of law*, UN Doc. A/57/275, para 17.
[61] Ibid., para. 17.
[62] See UN Document A/56/40, vol. I, annex VI .
[63] *Strengthening the rule of law*, UN Doc. A/57/275, paras. 19-22.

### 3.1.2 The rule of law and transitional justice in conflict and post-conflict societies

The need for a common understanding of key concepts such as the rule of law is essential for the international community in its work to enhance human rights, protect persons from fear and want, address property disputes, encourage economic development, promote accountable governance and peacefully resolve conflicts. This is stated in the report "*The rule of law and transitional justice in conflict and post-conflict societies*".[64]

The concept of the rule of law is described as "*A concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.*" [65]

It is noted in the report that the Charter, together with international human rights law, international humanitarian law, international criminal law, and international refugee law, constitutes the normative foundation for developing the rule of law, including the wealth of UN human rights and criminal justice standards developed in the last half-century. "*These represent universally applicable standards adopted under the auspices of the United Nations and must therefore serve as the normative basis for all United Nations activities in support of justice and the rule of law.*" [66]

It is stated that effective rule of law and justice strategies must be comprehensive[67], and in the concluding chapter the report gives a number of recommendations, which includes ensuring that peace agreements and SC resolutions and mandates:[68]

- "*Respect, incorporate by reference and apply international standards for fairness, due process and human rights in the administration of justice.*"[69]
- "*Require that all judicial processes, courts and prosecutions be credible, fair, consistent with established international standards for the independence and impartiality of the judiciary, the effectiveness,*

[64] *The rule of law and transitional justice in conflict and post-conflict societies* UN Doc. S/2004/616, para 5.
[65] Ibid., para. 6.
[66] Ibid., para. 9.
[67] Ibid., para. 23.
[68] Ibid., para. 64.
[69] Ibid., para. 64(b).

*impartiality and fairness of prosecutors and the integrity of the judicial process.*"[70]

- "*Recognize and respect the rights of both victims and accused persons, in accordance with international standards, with particular attention to groups most affected by conflict and a breakdown of the rule of law, among them children, women, minorities, prisoners and displaced persons, and ensure that proceedings for the redress of grievances include specific measures for their participation and protection.*"[71]

## 3.2 The link between human rights and the UN conception of the rule of law

Wennerström claims that the definition of the rule of law concept in the 2004 report is the most comprehensive rule of law definition presented by the UN system. He further notes that the component "legal quality" in the report means that states and their subjects are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights norms and standards. The component thus has both a formal and a substantive content, and combines the rule of law with international human rights.[72]

## 3.3 A multiple rule of law?

The HRCion adopted the resolution "*Democracy and the rule of law*" in 2005, in which a third definition of the rule of law was presented. This time components of the rule of law concept that are necessary for the promotion and consolidation of democracy were identified. Wennerström notes that this definition is less operative than the earlier definitions and that it focuses on other aspects of the range of possible rule of law qualities. Wennerström argues in his thesis on the premise that there is a multiple rule of law definition as well as situations where no applicable definition exists, and he argues that the deliberations of the UN confirm this. He concludes that the UN may have imperfections in its structures, but that it is a success in itself that this "cumbersome organisation", during the last decade, has taken important steps towards defining a rule of law conception of its own. He states, "*With every step, we come closer to introducing such a definition as a concrete element in international law after which an internationally valid case law would start to emerge. So far, we cannot discern any strength being applied behind any of the definitions of the UN system. The definitions are persuasive only because it is the UN uttering them – there is no conditionality or sanctions attached to them.*" [73]

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[70] *The rule of law and transitional justice in conflict and post-conflict societies* UN Doc. S/2004/616 para. 64(e).
[71] Ibid., para 64(f).
[72] Wennerström, *supra note* 28, p. 26.
[73] Ibid., p.27 f.

# 4 The UN sanctions regime

As the primary objective of the UN is to maintain international peace and security, the key security provisions of the Charter deal with how to handle threats to the peace. In order to do so the SC may call upon parties to settle their dispute by pacific means, such as negotiation and judicial settlement, or even recommend such terms of settlement as it considers appropriate.[74] If the parties fail to settle their dispute, the SC may call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable, in order to prevent an aggravation of the situation. Moreover, in order to give effect to such decisions the SC may call upon the Members to apply such measures, not involving the use of force, as are decided by the SC. If these fail, the SC may authorize the use of force.[75] The measures, which are used in order to induce compliance with SC decisions when pacific means fail to succeed in settling the dispute in question and where military response is either inappropriate or impossible, are called sanctions. Sanctions, e.g. trade embargoes, can be partial or more comprehensive. The legal basis for sanctions is contained in Article 41 of Chapter VII of the Charter, which states:

> "The Security Council may decide what *measures not involving the use of armed force* are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include *complete or partial interruption of* economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." (My italics)[76]

## 4.1 An historical review of the regime

The Cold War seriously impeded the functionality of the UN, and it restrained the SC in using its powers. Sanctions were invoked against South Rhodesia in 1966 and against South Africa in 1977. After that, sanctions were not invoked again until the SC acted against Iraq in 1990. After sanctions were invoked against Iraq, it became almost a routine measure to invoke sanctions as a resort to settle a dispute without having to use military force. Initially, there was little concern over collateral damage from these sanctions, including in the humanitarian sphere. On the contrary, Chesterman et.al suggest that sanctions were in the early 1990's sometimes viewed as a "*magic bullet*" that could achieve a degree of coercion without the dangers inherent in the use of force. During this period, comprehensive or partial sanctions were imposed on Iraq, Yugoslavia, Libya, Liberia, Somalia, parts of Cambodia, Haiti, parts of Angola, Rwanda, Sudan, Sierra

[74] Articles 33 and 36 of the UN Charter.
[75] Articles 40, 41 and 42 of the UN Charter.
[76] *Charter of the United Nations*, article 41.

Leone, and Afghanistan. It soon became clear, however, that the comprehensive sanctions, notably against Iraq, resulted in serious and unacceptable collateral damage, and causing humanitarian distress.[77]

In the case of Iraq, the UN's Oil-for-Food Programme relieved the situation somewhat, although it became clear over time that the Baghdad authorities generally turned the sanctions regime to their advantage, through the creation of black markets they controlled.[78] Disaffection began nonetheless to grow, both within the SC and more generally throughout the world. The plight of Iraqi civilians especially became undeniable, and was publicised both by the Iraqi government, NGO's and by UN staff. The permanent members of the SC had, by 1995, split into two camps with China, France and Russia demanding the removal of the sanctions while Britain and the United States insisted on their maintenance. The consequences of the sanctions had clearly created a serious hostility against the sanctions regime in most of the UN's member states and a degree of skepticism about the use of sanctions more generally.[79]

The case of Haiti is another situation where the sanctions measures imposed created serious collateral damage. The economic sanctions, in place for little more than a year, devastated Haiti's economy. As the sanctions were not efficient enough in themselves, it took the threat of force by a US-led coalition authorized by the SC to attain the purpose of the sanctions. Haiti was already the poorest country of the western Hemisphere, and the damage caused proved lasting. Chesterman et al. suggest that a credible threat of use of force from the beginning would probably have been a better strategy for restoring President Aristide, rather than the incremental measures adopted.[80]

Another option for the SC is to impose diplomatic sanctions. Diplomatic sanctions proved successful when invoked against South Africa in 1977. The measures introduced the element of "pariah state". Diplomatic sanctions also proved also successful when invoked against Sudan.[81] However, diplomatic sanctions are not efficient in all situations and since comprehensive sanctions had caused unacceptable humanitarian suffering, there was a need to develop a new strategy for using sanctions. Consequently, so-called "*smart sanctions*" were developed in order to reduce the humanitarian suffering caused by more or less comprehensive

[77] Chesterman, Franck and Malone, *supra note* 8, p. 342-343.
[78] Ibid., p. 354.
[79] Ibid., p. 343.
[80] Ibid., p. 359 f. The purpose of the sanctions was to restore the democratically elected President Jean-Bertrand Aristide who was overthrown in October 1991. The *de facto* authorities were dislodge in September 1994, with President Aristide resuming power the following month.
[81] Ibid., p. 360 ff. The sanctions measures were invoked after the assassination attempt against President Mubarak of Egypt while visiting Ethiopia in 1995, since investigations to the incident suggested involvement of the Sudanese government. Sudan took a number of steps to co-operate with the particular inquiries relating to the assassination attempt and more broadly to moderate its international behaviour, notably by working with other UN member states in the fight against terrorism.

sanctions. By targeting sectors of the economy or specific individuals more likely to influence policies, the sanctions were supposed to be "*smarter*" as they reduced the collateral damage usually caused by comprehensive sanctions. One idea of a smart sanction is to confine the sanction as to ensure that those affected by it are also those perceived as most responsible for the situation that led to its imposition.[82] This kind of targeted sanction measure includes e.g. financial sanctions such as assets freeze. One such measure imposed by the SC is the assets freeze of designated individuals and entities associated with Al-Qaida, Usama bin Laden and/or the Taliban. The individuals and entities designated by the Al Qaida and Taliban Sanctions Committee are the "*targets*" of the sanctions, which includes e.g. freezing of their assets. In this way, the sanctions are supposed to suppress the terrorists and reduce the risk of terrorist actions as the terrorists are denied of their funds.[83] As Chesterman et al. suggest, this utilitarian approach to minimizing suffering has raised different concerns, as the identification of individuals for freezing of their assets suggested a shift in the way that sanctions were being used.[84]

The use of sanctions is still seen as a vital tool at the disposal of the SC for dealing preventively with threats to international peace and security. Sanctions targeted on belligerents, in particular the individuals most directly responsible for reprehensible policies, is also seen as a vital tool in the UN arsenal. Sanctions are part of the global strategy against terrorism.[85]

## 4.2 Terrorism, Sanctions and Committees

The SC established the Committee concerning Al-Qaida and the Taliban and Associated Individuals and Entities in 1999, also known as the "*Al-Qaida and Taliban Sanctions Committee*" or the "*1267-committee*", since it was established pursuant to resolution 1267(1999). Subsequent resolutions have modified and strengthened the sanctions measures imposed in the first resolution, and the task of the committee today is to oversee the implementation of the measures imposed on designated individuals and entities associated with Al-Qaida, Usama bin Laden and/or the Taliban, wherever located. The first as well as the subsequent resolutions were all adopted under Chapter VII of the Charter. The sanctions imposed include freezing of assets, prevention of entry into or transit through the members territories, and prevention of the direct or indirect supply, sale and transfer of arms and military equipment. The Committee, which is made up of representatives from all SC members, designates the list of individuals and entities, also called the "Consolidated List".[86]

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[82] Chesterman, Franck and Malone, *supra note* 8, p. 366.
[83] See e.g. SC Resolution 1267(1999), 1333(200), 1373(2001) and 1822(2008).
[84] Chesterman, Franck and Malone, *supra note* 8, p. 366.
[85] *In Larger Freedom: towards development, security and human rights for all*, UN Doc. A/59/2005, para. 110, available at http://www.un.org./largerfreedom.
[86] SC Res 1267 (1999), See also e.g. 1333(200), 1373(2001) , 1822(2008) and the website of the Committee , *Information*, http://www.un.org/sc/committees/1267/information.shtml.

After the terrorist attacks against the USA in 2001, the SC established the Counter-Terrorism Committee (CTC). The CTC is established pursuant to Resolution 1373(2001), and consists of all SC members. According to the resolution, Member States are required to take a number of measures to prevent terrorist activities and to criminalize various forms of terrorist actions. The measures are intended to enhance the member state's legal and institutional ability to counter terrorist activities at home, and around the world. The task of the Committee is to monitor implementation of the resolution. The CTC is assisted by a Counter-Terrorism Committee Executive Directorate (CTED) established by the SC in 2004.[87] In 2004, the SC also established the 1540-Committe. The task of this Committee is to monitor Member States' compliance under the Resolution 1540(2004), which aims to prevent the proliferation of weapons of mass destruction to non-state actors, including terrorist groups. This committee consists of all SC members.[88] The Committees co-operate on common issues, share information on the assistance needs of the members, and have distinct but complementary roles.[89]

The imposed sanctions measures on the individuals and entities designated by the Al Qaida and Taliban Sanctions Committee, have called into question a number of substantive rights, such as the rights to effective remedy, access to court, freedom of movement and the right to property.

The UDHR protects the right to an effective remedy in Article 8, the right to a fair and public hearing in Article 10, freedom of movement in Article 13 and the right to property in Article 17. Furthermore, in accordance with Article 12 of the UDHR, no one shall be subject to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honour and reputation, and everyone has the right to the protection of the law against such interference or attacks.

The ICCPR protects the right to freedom of movement in Article 12 and Article 17 protects against interferences with a person's privacy, honour and reputation. Article 14 of the ICCPR protects the right to a fair and public hearing.

As these are provisions arguably regarded as protected by the UN Charter and binding upon the SC, there is in addition a range of international conventions and regional provisions which are important in the context of implementation of these sanctions measures.[90]

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[87] SC Res 1373(2001) and SC Res 1535(2004), See also the website of the Committee, *About Us* http://www.un.org/sc/ctc/aboutus.html.
[88] SC Res 1540(2004), See also the website of the Committee, http://www.un.org/sc/1540/index.shtml.
[89] See the website of the Committee , *Information*, *supra note* 82.
[90] See 1.0, 2.2 and 2.5.

# 5 Specific actions to refine the use of targeted sanctions

As the interest in the use of targeted sanctions grew during the 1990's, a number of steps were taken both by states and by the UN in order to improve the use of the targeted sanctions regime. The Swiss government was the first to initiate and convene seminars of experts to discuss and explore ways of improving targeted sanctions, aiming to make them more effective. The seminars, which took place in March 1998 and in March 1999, are known as the "*Interlaken Process*". The overall purpose of the Interlaken Process was to elaborate on the specific requirements of financial sanctions regimes and to develop new options of more targeted and effective sanctions. Following the model of the Interlaken Process, the German Government initiated another session of seminars, which took place in November 1999 and December 2000, known as the "*Bonn/Berlin Process*". The aim of this session was to examine the use of travel bans, aviation sanctions, and arms embargos by the UN, as these measures, often used in conjunction with targeted financial sanctions, can be tailored to target certain groups, economic sectors or individuals. Later, Sweden initiated a third session of seminars in November 2001, known as the "*Stockholm Process*". This session, founded upon proposals presented in the earlier processes, focused on how targeted sanctions are implemented and monitored. As each of the processes focused on different concerns to the use of targeted sanctions, they have contributed to the development of the sanctions regime with an examination of both technical requirements of targeted sanctions as well as with an examination of the implementation, monitoring and effectiveness of the sanctions. The results of each of the processes, including draft text for the SC for creating sanctions resolutions, have been presented to the SC.[91]

## 5.1 The Interlaken Process

Participants of the first seminar, *Interlaken I*, were sanctions experts from the UN Secretariat, national governments and UN-Missions, as well as experts from National Banks and Treasuries, private fund management experts from private banks, and finally academics. Experts from more than twenty governments representing all regions of the world were invited.[92] The purpose of the seminar was to discuss the technical aspects of the targeting of financial sanctions and to share experiences regarding the implementation of financial sanctions. The discussion of the challenges of *designing* and *implementing* targeted financial sanctions, resulted in

[91] For summaries of each of the processes, see the website for the Watson Institute for International Studies, http://www.watsoninstitute.org/tfs/CD/sanc.html.

[92] Report on the *Expert Seminar on Targeting Un Financial Sanctions*, the Swiss Federal Office for Foreign Economic Affairs, *Introductory Statement*, available at http://www.seco.admin.ch/themen/00513/00620/00639/00641/index.html?lang=en.

identification of preconditions necessary to make targeted UN sanctions more effective. Among these requirements were clear identification of the target, the ability to identify and control financial flows and the strengthening of financial sanctions as such.[93] The second meeting, *Interlaken II*, was held with the objective to once again give an opportunity for all the parties involved in the imposition of financial sanctions to examine concrete proposals to improve the effectiveness of the financial sanctions regime and to limit the humanitarian impact of comprehensive economic embargoes.[94]

The second seminar was divided into three working groups, each of which focused on one of the central areas of enquiry. The areas of enquiry were technical aspects of the targeting of financial sanctions, main elements of domestic legislation for sanctions implementation, and building blocks and definitions for financial sanctions resolutions.[95]

The first group concluded that targeted financial sanctions demand a deep and detailed amount of qualitative information and analysis of the financial and economic profile of the targeted state's elite and their institutional connections. It was also concluded by the group that member states have the responsibility for creating and maintaining lists of designated individuals to be targeted for financial sanctions, and that UN Sanctions Committees should be charged with monitoring the discrepancies between the national lists as they occur over time and disseminate any relevant information to member states. It was also recognized by the group that a number of states did not have the necessary legal framework to establish and maintain such a list of individual targets, and the group suggested that, in the case of e.g. the European Union, the European Commission should examine the possibility of creating an overarching authority whereby member states could establish such a list.[96]

The second group examined the basic elements for a framework law for the implementation of financial sanctions. While they reviewed and made recommendations for improving a draft text of a model enabling law, the group noted that other issues, such as the characteristics of secondary legislation and administrative issues, demanded more discussion and analysis, which was not possible at the meeting.[97]

The third group reviewed a set of options available to the SC in freezing financial assets and blocking financial transactions. The options were presented with a draft document including definitions of technical terms and detailed technical elements for sanction resolutions. However, it is stated in

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[93] Report, *supra note* 92.
[94] Report on the *2nd Interlaken Seminar on Targeting UN Financial Sanctions*, the Swiss Federal Office for Foreign Economic Affairs, *Chairman's Report*, para 1, available at http://www.seco.admin.ch/themen/00513/00620/00639/00641/index.html?lang=en.
[95] Ibid., para. 7.
[96] Ibid., paras. 10-11.
[97] Ibid., paras. 21-22.

the Chairman's report that the text proposed is not meant to be a draft resolution, but only offers a comprehensive list of options available to the SC when negotiating the text of a proposed financial sanctions resolution. In particular, it proposes a list of possible prohibitions and exemptions. This group further noticed that the first group worked on the assumption that the imposition of financial sanctions is the prerogative of the SC under Chapter VII of the Charter. As sanctions are implemented nationally, it gave rise to a discussion on the need to harmonize national interpretations. The participants of the third group reflected also on the mandate given to the Sanctions Committees and the UN Secretary General. They considered that the Sanctions Committees, with the support of the UN Secretariat, should undertake regular assessments of the technical effectiveness of targeted financial sanctions.[98]

Important accomplishments of the Interlaken Process were, as concluded by the Chairman, an increased knowledge of how financial sanctions work and the elaboration of technical guidelines for increasing the effectiveness of SC resolutions imposing targeted financial sanctions. Further accomplishments were the development of model legislation to assist Member States in formulating national legislation on financial sanctions, and the establishment of an informal international cooperation mechanism, with participation from Member States, the financial sector and academic think-tanks and experts, to facilitate the implementation of targeted financial sanctions.[99] The Chairman concluded that the Interlaken process has raised the level of confidence on the feasibility of SC imposed targeted financial sanctions regimes.[100]

A number of recommendations, to be addressed in order to enhance the effectiveness of targeted financial sanctions, were presented. These were the need to expand the limited expertise that exists within the UN Secretariat with regard to targeted financial sanctions, and the need for Member States to adopt the procedures required for proper implementation of such sanctions as regards financial institutions and banks within their jurisdiction. Further recommendations were the need for the SC and the Secretariat to devise the exact system of international cooperation needed to provide guidance on targeted sanctions policy, and the need for institutions and agencies outside the UN system to develop a framework that would enable their contribution toward assessing the vulnerability of a given state to financial sanctions, and the potential humanitarian consequences of such an imposition.[101]

The Swiss Government asked the Watson Institute's Targeted Financial Sanctions Project to develop a manual for practitioners which should consolidate the contributions of the Interlaken Process into practical tools to refine the use of financial sanctions. The result, *Targeted Financial Sanctions:*

[98] Report, *supra note* 94, paras. 23-25.
[99] Ibid., para 31.
[100] Ibid., para 32.
[101] Ibid., para 32.

*a Manual for Design and Implementation*, provides draft language for those developing SC resolutions imposing targeted financial sanctions and identifies "best practices" for the implementation of those measures at the national level. The Manual, which was presented to the SC in October 2001, is intended to serve as a guide for both SC members and national officials responsible for designing and implementing targeted financial sanctions.[102]

## 5.2 The Bonn/Berlin Process

At the First Seminar, held in Bonn, experts gathered to analyse the deficiencies of the sanctions concerned.[103] They noted weaknesses at the UN-level and implementation problems on the ground. A broad range of proposals to increase the effectiveness of arms embargoes and travel and aviation bans was discussed, and a number of proposals that would benefit from a more thorough examination by an Expert Working Group were selected. Consequently, four experts groups were established. Each of the groups worked out proposals during the coming year which were presented at the Final Seminar in Berlin. The first group focused on developing model resolutions and proposals for the national implementation of travel and aviation sanctions. The second group concentrated on how to make arms embargoes more effective "on the ground". The third group developed model text for SC resolutions on arms embargoes. The fourth group suggested ways to improve monitoring and enforcement of arms embargoes at the UN level. Participants in the Final Seminar commented upon the work of the groups, and placed their proposals in the wider context of the sanctions debate. All the final reports and relevant commentaries are published in '*Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions: Results of the 'Bonn-Berlin Process'*, a document which was presented along with the Interlaken Manual to the SC at its meeting on 22 October 2001.[104]

## 5.3 The Stockholm Process

The purpose of the Stockholm Process was to strengthen the implementation of targeted sanctions by dealing with the application of targeted sanctions and aiming at providing further contributions to the current international debate on the issue. In the report of the Stockholm Process it is stated that targeted sanctions are *necessary*. The reason for this is by the report stated to be that the international community must have at its disposal the means to react to and address situations that threaten international peace and security, other than military action or declaratory statements. Further, targeted sanctions can be less costly than e.g. military options, if the sanctions are applied effectively. The report also notes that targeted sanctions can reduce the humanitarian impact caused by comprehensive sanctions that the international community is unwilling to tolerate, and that targeted sanctions

[102] *Summary of the Interlaken Process*, Watson Institute for International Studies, Brown University, available at http://www.watsoninstitute.org/tfs/CD/sanc.html .
[103] See 5.0.
[104] *Summary of the Bonn/Berlin Process*, Watson Institute for International Studies, Brown University, available at http://www.watsoninstitute.org/tfs/CD/sanc.html.

are directed towards those responsible for the threat to international peace and security and that the sanctions in this way are aiming at changing this behavior.[105] Among the recommendations established by the Stockholm Process, it is stated that issues of processes for listing and de-listing of individuals and entities as targets are crucial for the accuracy and effectiveness of the measures. The report recognizes that it is important that listed individuals are correctly identified - *that they are actually responsible for the policies and remain so throughout the listing period*.[106]

Part IV of the report deals with the refining of the accuracy and efficacy of targeted sanctions, and begins by recognizing that the key problems in targeting the actor are: the identification of the actor; determining which resources should be subject to sanctions; the counter-reactions of the targeted actor; and the ability and willingness of third states to make sanctions effective. The accuracy of the targeting is crucial for the strength of the entire chain of implementation measures and, ultimately, this determines whether the SC achieves its goals. The report further states that there is a risk of more comprehensive sanctions if the targeted sanctions do not succeed.[107]

Among the problems identified in the targeting element of the chain of implementation is the fact that targeted actors are likely to utilize a range of strategies before and after sanctions are implemented including justification of their evasion of sanctions on human rights grounds, which may or may not be sustained, and using propaganda and/or media campaigns to make arguments justifying their evasion of sanctions and objections to sanctions. Another problem is that member states may be reluctant to implement mandated sanctions if they are seen to be overly broad, or to conflict with country-specific legal rights of their citizens and residents.[108] Concerning the listing of individuals and entities the report recommends:

- "*Clear justification, transparency and speed regarding selection of individuals, groups and entities for listing that reflect principles of due diligence.*"[109]
- "*Introducing the possibility of administrative or judicial processes (e.g. regular reviews of names on the list) that fulfill ordinary expectations of due process to address mistakes that may occur in listing and to take into account compliance or changed behavior by listed individuals and entities.*"[110]

[105] Report of the Stockholm Process *Making Targeted Sanctions Effective – Guidelines for the Implementation of UN Policy Options*, Uppsala University, Uppsala 2003, para. 6, electronic copy available at http://www.smartsanctions.se/ .
[106] Ibid., para. 282.
[107] Ibid., para. 267.
[108] Ibid., para. 269.
[109] Ibid., para. 283.
[110] Ibid., para. 284.

- "*Delisting procedures should be made explicit by the relevant Sanctions Committee in a timely way following the imposition of targeted sanctions and the publication of list.*"[111]
- "*Maximum specificity in identifying individuals and entities to be targeted.*"[112]
- "*Disseminate up-to-date lists as widely as possible via the Internet on the websites of the Sanctions Committees as well as through other public outlets, and traditional media channels such as radio and television, and through effort of Member States. When distributed via the Internet and on UN websites, the lists should be downloadable by users and fully searchable for all terms of identification.*"[113]

The Stockholm Process Report, *Making Targeted Sanctions Effective*, was delivered to the SC on 25 February 2003. The project changed name to the Special Program on the Implementation of Targeted Sanctions (SPITS) as the work continued by spreading information on the Stockholm Process, deepening the academic research on targeted sanctions and keeping a continuously updated website on the development on sanctions issues in the UN. It is also the program's ambition to keep information on sanctions by the EU.[114]

## 5.4 Strengthening Targeted Sanctions Through Fair and Clear Procedures

The Swiss government has sponsored, along with the governments of Germany and Sweden, the Watson Institute Targeted Sanctions Project at Brown University in preparing a white paper called "*Strengthening Targeted Sanctions through Fair and Clear Procedures*".

At the time of creation of the white paper, cases had been brought before the CFI concerning the implementation of targeted sanctions within the EU. The paper notes that these legal actions potentially pose significant challenges to the efficacy of targeted sanctions measures. Improvements in the procedures to apply sanctions could however reduce the risk of judicial decisions that could complicate efforts to promote international peace and security. These improvements could ensure that the measures are fair and clear in their application. The paper notes that important improvements have been made by the UN sanctions committees but that criticism persist about procedures related to the designation or listing of individuals, operations of committees, and the process for individuals and entities to be removed from the list. A number of concerns are identified by the paper such as the lack of

[111] Report, *supra note* 105, para. 285
[112] Ibid., para. 286.
[113] Ibid., para. 287.
[114] See website for the Stockholm Process and the Special Programme on the Implementation of Targeted Sanctions (SPITS) http://www.smartsanctions.se/.

information regarding the basis for listing, problems in notifying listed individuals and entities, and lack of transparency of committee procedures and difficulties in obtaining information. As these concerns have contributed to a general perception of unfairness, the paper suggests a range of proposals for improvement of listing, procedural issues and options for a review mechanism.[115] The paper suggests:

- That criteria for listing should be detailed, but non-exhaustive, in SC resolutions.
- That norms and general standards for statements of case should be established, and that the time of review of listing proposals should be extended from two or three to five to ten working days for all sanctions committees.
- That the UN body should notify the targets, to the extent possible, of their listing, the measures imposed and give information about procedures for exemptions and delisting.[116]

Concerning procedural issues, it is suggested:

- That an administrative focal point within the Secretariat to handle all delisting and exemption requests, as well as to notify targets of listing, should be designated.
- That a biennial review of listing should be established, and the effectiveness of sanctions committees should be enhanced by establishing time limits for responding to listing, delisting, and exemption requests, as well as by promulgating clear standards and criteria for delisting.
- That the transparency of committee practices should be increased through improved websites, more frequent press statements, and a broader dissemination of committee procedures.[117]

The paper states further that there is a need for some form of review mechanism to which individuals and entities may appeal decisions regarding their listing. A number of options for a review mechanism are suggested, including a review mechanism under the authority of the SC for consideration of delisting proposals, an independent arbitral panel to consider delisting proposals and judicial review of delisting decisions. Regarding the review mechanism under the authority of the SC, it is suggested that the mandate of the Monitoring Team are expanded, that an eminent person is appointed as an Ombudsman to serve as interface with the UN, and that a Panel of Experts is created to hear requests.[118]

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[115] *Strengthening Targeted Sanctions Through Fair and Clear Procedures*, Watson Institute for International Studies, Brown University, March 2006, p. 3 f. available at http://www.seco.admin.ch/themen/00513/00620/00639/00641/index.html?lang=en.
[116] Ibid.
[117] Ibid.
[118] Ibid.

## 5.5 Enhancing the Implementation of UN Security Councils Sanctions

On the initiative of Greece, a symposium was held in April 2007 at the UN headquarters in New York, where governments and representatives further dealt with the advancement of sanctions implementation. The symposium consisted of two panels and three workshops. The first panel consisted of ambassadors that high-lighted and presented "*lessons learned*" by presenting different cases where sanctions have proved more or less successful, while the second panel consisted of experts who reviewed and presented the emergence of targeted sanctions since the 1990's.[119]

### 5.5.1 The Ambassadors' panel

One of the cases presented was the sanctions imposed against UNITA in the decade-long war between the government of Angola and the UNITA faction. The UN became involved in the civil war by mediation in 1988, and deployed three different peacekeeping missions. As the mediation did not prove successful, the SC imposed a range of sanctions on UNITA through resolution 684(1993). The sanctions were, however, largely ignored by the international community and proved inefficient. Through a range of resolutions, the SC tried to strengthen the sanctions by making them more detailed and confined. In 1999, the SC took the step to establish an expert monitoring panel.[120] According to the panel, the greater efforts to encourage implementation of the sanctions made the impact of the sanctions significant. The sanctions measures imposed reduced the resources available to UNITA and made it more difficult for the factions leader Jonas Savimbi to keep his equipment fuelled and his forces armed. The report of the panel states that this led directly to his defeat in the field by Angolan government units in February 2002.[121] The panel states that the lessons learned from the case of UNITA include:

- The need for more rigorous review of the actual impacts of sanctions;
- The importance of monitoring groups in "naming and shaming" those who violate sanctions;
- The fact that more vigorous efforts can be applied to improve sanctions implementation even after years of neglect; and
- The need for more Secretariat staff to support sanctions implementation.

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[119] *Enhancing the Implementation of United Nations Security Council Sanctions*, 30 April 2007, New York, Report Summary, available at http://www.watsoninstitute.org/pub.cfm.
[120] Chesterman, Franck and Malone, *supra note* 8, p. 363 ff.
[121] Symposium, *supra note* 119. Chesterman et al. (Ibid.) suggest however that even though the strengthened implementation doubtless played a role in the government's collapse, it was the death of Savimbi, killed in an ambush in February 2002 that led to an end of fighting and an initiation of national reconciliation. However, maybe it is possible to argue that the killing of Savimbi was made possible because of his reduced forces?

The panel continues to describe the cases of Liberia and Côte d'Ivoire. In both cases, targeted financial sanctions such as freezing of assets were imposed. In the first case, the financial assets freezes were only partially successful, largely because the sanctions were implemented poorly. The panel states that the lack of clear procedures for delisting named individuals created difficulties. In the second case, the SC only managed to impose the financial sanctions against three individuals. The panel concluded that the lessons learned from these cases include:

- That sanctions can be effective if the SC through its expert groups can monitor developments closely and adjust its strategy to provide incentives for compliance;
- That the Council should take further steps to improve listing and de-listing procedures and must adopt more effective means of communicating its decisions to member states; and
- That it is important for sanctions committee members to have unity of purpose in the designation of individuals.

The Panel also presented lessons learned from Libya, which were:

- That sanctions can help to change state behaviour when they are not utilized as punishment and retribution;
- That the prospect of lifting or suspending sanctions can be an important inducement for compliance;
- That suspension is a useful action that removes coercive pressure but allows for easier reimposition should conditions so require; and
- That indigenous factors and changing perceptions unique to each case must be weighed in determining how to achieve compliance.[122]

## 5.5.2 The Experts' panel

The second plenary panel featured nongovernmental sanctions experts from the Watson Institute for International Studies at Brown University, the Kroc Institute for International Peace Studies at the University of Notre Dame, the Fourth Freedom Forum, and Uppsala University.[123]

The panel reviewed the emergence of targeted sanctions since the 1990's, and concluded that not only have sanctions gone from being a blunt instrument to being more selective and targeted, the objectives of sanctions have likewise changed. The objectives have evolved from changing the behaviour of targets threatening international peace and security, to facilitating compliance with peace agreements or investigations, and to preventing certain actions by targets through the denial of resources to support such actions. According to the panel, the effectiveness of sanctions should be defined as the creation of impacts that generate pressure for policy change, and leads to at least partial compliance. If so, the panel states that SC sanctions have achieved results in at least one-third to one-half of all cases, depending on how generously one defines partial compliance. As no

[122] Symposium, *supra note*, 119.
[123] These Universities co-sponsored the symposium along with the SC Subsidiary Organs Branch, SC Affairs Division and the Department of Political Affairs of the UN.

country wishes to be isolated and stigmatized, the panel argues that the signalling effect of sanctions is important, and that this alone can encourage a country to seek a political settlement. A key inducement is the prospect of sanctions lifting.[124]

The panel divides the sanctions into two categories; one including measures which are related to regional and national security issues and the prevention of armed conflict, and another including those measures that are connected to global issues of countering terrorism and preventing the proliferation of weapons of mass destruction. The panel points out that the prospects for success of imposed sanctions are enhanced when integrated with other UN policy tools such as peacekeeping. Further, that experience has shown that sanctions should not be used to remove a regime or change its fundamental nature. The panel remarks that while significant advancement of the targeted sanctions instrument has taken place during the last fifteen years, challenges remain. Needed reforms include:

- Additional progress in listing and de-listing procedures to ensure that human rights and due process concerns are addressed;
- The creation of a searchable database of all expert panel reports and files;
- Enhanced capacity-building efforts among member states and regional organizations and increased public awareness; and
- More effective use of the media to communicate the purposes and implementation requirements of SC sanctions.[125]

### 5.5.3 Workshops

Four workshops covered the issues of information management and media communication; controlling arms and the proliferation of weapons of mass destruction; building capacity at national, regional and international level; and refining the sanctions instrument. The discussion of the first workshop addressed both internal information management challenges within the UN system and the need for more effective communication strategies which external audiences. "*Because the threats or coercive pressures do not communicate well, all elements of the United Nations mission must be in a position to provide clear, understandable information to the populations of target states regarding the purposes and goals of sanctions. The question of who speaks for the United Nations in a particular country is not always clear. Communicating to external audiences the purpose and goals of united nation actions, including sanctions, is an important part of creating the political will that is necessary for effective implementation.*"[126]

The second workshop concluded that arms embargoes have become more effective in recent years, due partially to better implementation and the integration of other forms of targeted sanctions. The third workshop

[124] Symposium, *supra note*, 119.
[125] Ibid.
[126] Ibid.

concluded: "*While important differences exist between the mandate of the Counter-Terrorism Committee created by resolution 1373(2001) and the missions of sanctions committees, such as the Al-Qaida and Taliban Sanctions Committee mandated by resolution 1267(1999), many areas of overlap exist. Greater coordination in the provision of capacity-building assistance would benefit implementation of both counter-terrorism and sanctions mandates.*" This workshop argues that the co-operation between Interpol and the 1267 sanctions committee stand as an example of improved capacity-building coordination. "*The link between capacity-building and the United Nations development assistance agenda need greater attention, to determine the degree of overlap in development and security agendas.*"[127]

The fourth workshop concluded that progress has been achieved in recent years in the technical aspects of designing and developing sanctions, and that remaining outstanding issues include the need for further improvement in listing and de-listing procedures, better definition of targeted measures, more effective monitoring procedures, and exploring the prospect of extending financial sanctions to credit. "*A lack of political consensus among nations often hampers sanctions implementation. This can be addressed by combining a carrot and sticks approach that includes inducements as well as coercive pressures, by integrating sanctions with other United Nations operations such as peacekeeping and by building upon and encouraging regional approaches. There is need for more 'policy oriented' discussions of sanctions to build greater political support for effective implementation.*"[128]

[127] Symposium, *supra note*, 119.
[128] Ibid.

# 6 Renewing the United Nations

"*Every day we are reminded of the need for a strengthened United Nations, as we face a growing array of new challenges, including humanitarian crises, human rights violations, armed conflicts and important health and environmental concerns. Seldom has the United Nations been called upon to do so much for so many. I am determined to breathe new life and inject renewed confidence into a strengthened United Nations firmly anchored in the twenty-first century, and which is effective, efficient, coherent and accountable.*" [129]

Secretary-General Ban Ki-moon
http://www.un.org/reform/

## 6.1 The reform

The work to reform the UN was set off by SG Kofi Annan in 1997 with the report "*Renewing the United Nations: a Programme for Reform*". The introduction of the report describes an organisation that has made many great achievements since its establishment, but also an organisation that aspires to do much more, and it is stated that the fundamental objective of the reform is to narrow the gap between aspiration and accomplishment. This is suggested to be done by establishing a new leadership culture and management structure at the UN that will lead to greater unity of purpose, coherence of efforts and agility in responding to the pressing needs of the international community. It is further stated that a reform of the machinery is no substitute for the willingness of Governments to use the organisation, nor that the organisation can bridge the real differences in interest and power that exist among member states. However, in order to enable the UN to "*do better what it is asked to do*"[130] and consequently to advocate and undertake with credibility its larger mission as an agency of progressive change for the world's nations and peoples alike, the institutional effectiveness of the UN is to be maximized.[131]

In the letter of transmittal, SG Kofi Annan declares that the reform measures concerning the organization and management of the Secretariat, programmes and funds, are measures with the intention "*to renew the confidence of Member States in the relevance and effectiveness of the Organisation and to revitalise the spirit and commitment of its staff*".[132] Some of the proposed measures concerned the close partnership and co-operation with member states.[133]

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[129] Reform under Ban Ki-moon: A Stronger United Nations for a Better World. See the Website for the Reform at the UN, http://www.un.org/reform/.
[130] *Renewing the United Nations: A Programme for Reform*, UN Doc. A/51/1997, para. 6, available at http://www.un.org/reform/.
[131] Ibid., paras. 1-6.
[132] Ibid., *Letter of Transmittal.*
[133] Ibid.

One of the achievements made in the reform-process during the following years was the establishment of the *United Nations Millennium Declaration* (UNMD) at the Millennium Assembly 6-8 September 2000. The heads of state and government, gathered at the UN headquarters in New York, reaffirmed their faith in the organisation and its Charter "*as indispensable foundations of a more peaceful, prosperous and just world*". The member states recognised that they have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level, in addition to their separate responsibility to their individual societies.[134] The declaration resolves e.g. to intensify the efforts to achieve a comprehensive reform of the SC. The members also define the UN as the "*indispensable common house of the entire human family*".[135]

The SG reported two years later, in the report "*Strengthening of the United Nations: an agenda for further change*", that the declaration now serves as a common policy framework for the entire UN system. As is stated in the report, the declaration contains a clear set of priorities, including precise, time-bound development goals. The report states, however, that more changes are needed, and the report suggests a number of improvements aimed at ensuring that the organisation devotes its attention to the priorities fixed by the member states, and that the Secretariat gives better service. The reports suggest further that the GA and the ECOSOC adapt in order to realize their potential, while the stalled process of the Security Council reform needs new impetus.[136]

In 2003, SG Kofi Annan set up the *High-Level Panel on Threats, Challenges and Change* in order to assess current threats to international peace and security, to evaluate how well the organisation's existing policies and institutions have done in addressing those threats, and to recommend ways of strengthening the UN to provide collective security for the twenty-first century. According to the SG, the panel's report sets out a broad framework for collective security and gives a broader meaning to that concept, appropriate for the new millennium. In addition to ways of dealing with particular threats, it also suggests new ways of understanding the connections between them, and explains what this implies in terms of shared policies and institutions. The SG states that in this way, the report offers a unique opportunity to refashion and renew the UN. [137]

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[134] *United Nations Millennium Declaration*, UN Doc. A/Res/55/2, paras. 1-2, available at http://www.un.org/millennium/summit.htm.
[135] Ibid., paras. 29-30 and para. 32.
[136] *Strengthening the United Nations: an agenda for further change*, UN Doc. A/57/387, p. 1 ff., available at http://www.un.org/reform/.
[137] *A more secure world: our shared responsibility*, UN Doc. A/59/565.

## 6.2 The 2005 World Summit

In September 2005, the world's leaders met at the UN headquarters in New York, to decide upon action on global threats. Asked by member states to report on the implementation of the UNMD, in preparation for the world summit that would take place, the SG Kofi-Annan presented the report "*In Larger Freedom: towards Development, Security and Human Rights for all*" in March 2005.[138] In the report, the SG notes that much has happened since the adoption of the UNMD, most remarkably the attacks of 11 September 2001, which made "*even the most powerful state feel vulnerable*".[139] Furthermore, he notes that the sheer imbalance of power in the world is a source of instability, which states have begun to feel.[140] The report deals with great challenges of the world; environmental issues; poverty and development issues; and security, freedom and human rights issues. The first chapter describes the challenges. The second chapter then deals with the development and environmental issues, while the third chapter deals with security issues such as how to prevent catastrophic terrorism, and how to reduce the risk and prevalence of war. The fourth chapter is concerned with the rule of law, human rights and democracy. The fifth deals with how to strengthen the UN, while the sixth and last summarises and concludes. I will give an account of relevant pieces of chapters three, four and five.

### 6.2.1 Chapter III - Freedom from fear

The SG begins by noting that concerning security, there is not only a lack of implementation but also a lack of a basic consensus among members. He states that the UN will lag in providing security to all of its members and the world's people, if the members cannot agree on a shared assessment of the threats that are facing the world, and on a common understanding of the obligations in addressing them. The SG believes that the more comprehensive concept of collective security, presented by the *High-level panel on threats, challenges and change*, can bridge the gap between divergent views of security and give us the guidance needed to face today's dilemmas.[141] He continues to describe the interconnectedness of the threats, and how the new security consensus must include entitlement to freedom from fear, that whatever threatens one threatens all, and that once the world understands this, there is no choice but to tackle the whole range of threats. In order to do so he suggests more consistent monitoring, more effective implementation and, where necessary, firmer enforcement of the security treaties signed by the Members. [142] He calls for a number of steps that are urgently required.[143]

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[138] *In Larger Freedom: towards development, security and human rights or all*, UN Doc. A/59/2005, para. 3, available at http://www.un.org./largerfreedom.
[139] Ibid., para 8.
[140] Ibid.
[141] Ibid., paras. 74-77.
[142] Ibid., paras. 80-82.
[143] Ibid., para. 89.

To begin with, those who may be tempted to support terrorism must be convinced that it is neither an acceptable nor an effective way to advance their cause. To strengthen the UN in condemning terrorism, the members need to agree on a definition of terrorism.[144] The SG fully endorse the High-level panel's definition of terrorism, making it clear that in addition to actions already proscribed by existing conventions, "*any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from doing any act*".[145] The world leaders are urged to unite behind it and to conclude a comprehensive convention on terrorism before the end of the sixtieth session of the GA.[146] The definition, included in a comprehensive convention, is necessary in order to create a new strategy to ensure that "*catastrophic terrorism never becomes reality*".[147] The strategy must be comprehensive and is suggested to be based on five pillars: dissuading people from resorting to terrorism or supporting it, denying terrorist access to funds and materials, deterring States from sponsoring terrorism, developing State capacity to defeat terrorism, and defending human rights. Member states and civil society organisations are urged to join in that strategy.[148] The SG further declares that we must never compromise human rights in our struggle against terrorism, and that "*by ceding the moral high ground we provoke tension, hatred and mistrust of Governments among precisely those parts of the population where terrorists find recruits*".[149] He therefore urges member states to create a special rapporteur who would report to the HRCion (now transformed to the HRCil) on the compatibility of counter-terrorism measures with international human rights laws.[150]

Promotion of democracy and the rule of law is one of several efforts in reducing the risk and prevalence of war, the most fundamental task of the UN.[151] The SG states that sanctions, constituting a necessary middle ground between war and word, are seen as a vital tool at the disposal of the SC in dealing preventively with threats to international peace and security. Targeted financial sanctions are one of them. By strengthening State capacity to implement sanctions, the implementation and enforcement of SC decisions would be more effective, establishing well-resourced monitoring mechanisms and mitigating humanitarian consequences. To minimize the suffering to innocent third parties and to protect the integrity of the programmes and institutions involved, future sanctions regimes must also be structured carefully, as sanctions are often used in difficult environments.[152]

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[144] *In Larger Freedom: towards development, security and human rights or all*, UN Doc. A/59/2005, para. 90, available at http://www.un.org./largerfreedom.
[145] Ibid., para 91
[146] Ibid.
[147] Ibid., para. 84.
[148] Ibid., para. 88.
[149] Ibid., para 94.
[150] Ibid., para. 94.
[151] Ibid., para. 106.
[152] Ibid., paras. 109-110.

### 6.2.2 Chapter IV - Freedom to live in dignity

The SG begins the chapter by recalling the UNMD, in which the Member States stated that they would spare no efforts to promote democracy and strengthen the rule of law, as well as to promote respect for all internationally recognized human rights and fundamental freedoms. In doing so, he declares, they recognized that all human beings have the rights to be treated with dignity and respect. He then continues: "*The protection and promotion of the universal values of the rule of law, human rights and democracy are ends in themselves. They are also essential for a world of justice, opportunity and stability. No security agenda and no drive for development will be successful unless they are based on the sure foundation of respect for human dignity*".[153]

The SG states that the normative framework that has advanced over the last six decades must be strengthened and that concrete steps must be taken to reduce selective application, arbitrary enforcement and breach without consequence – steps that "*would give new life to the commitments made in the Millennium Declaration*".[154] The system for protecting human rights at the international level is under considerable strain and to sustain long-term, high-level engagement in human rights issues, across the range of the UN's work, change is needed.[155] The SG believed that decisions had to be made in 2005 to help strengthen the rule of law internationally and nationally; the stature and structure of the human rights machinery of the UN needed to be enhanced; and efforts to institute and deepen democracy in nations around the globe needed more direct support.[156] After the establishment of the UNMD, the UN expanded its work to protect human rights. One example of this is the increased frequency in invitations to the High Commissioner to brief the SC on specific situations. The SG argues that this shows that there is now a greater awareness of the need to consider human rights in resolutions on peace and security. The SH then states that the High Commissioner must play a more active role in the deliberations of the SC, with emphasis on the implementation of relevant provisions in SC resolutions. The SG suggests strengthening the office of the High Commissioner for Human Rights.[157] "*Indeed, human rights must be incorporated into decision-making and discussion throughout the work of the Organization. The concept of 'mainstreaming' human rights has gained greater attention in recent years, but it has still not been adequately reflected in key polices and resource decisions*".[158]

Regarding human rights, The SG declares, "*We must move from an area of legislation to an area of implementation. Our declared principles and our*

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[153] *In Larger Freedom: towards development, security and human rights or all*, UN Doc. A/59/2005, para. 128, available at http://www.un.org./largerfreedom.
[154] Ibid., para 131.
[155] Ibid., para. 141.
[156] Ibid., para. 132.
[157] Ibid., paras 142-145.
[158] Ibid., para. 144.

*common interest demand no less.*"[159] In addition, regarding the rule of law, "*[...] a mere concept is not enough. New laws must be put into place, old ones must be put into practice and our institutions must be better equipped to strengthen the rule of law*".[160]

### 6.2.3 Chapter V - Strengthening the UN

The SG states in this chapter that the UN as an Organisation clearly was built for a different era, and that not all current practices are adapted to the needs today. Even though many changes have been made since the reform progress began in 1997, more changes are needed. [161] "*If the United Nations is to be a useful instrument for its Member States and for the world's peoples, in responding to the challenges described [...] it must be fully adapted to the needs and circumstances of the twenty-first century. It must be open not only to States but also to civil society, which at both the national and international levels plays an increasingly important role in world affairs*".[162]

Concerning the SC, the SG supports the position set out in the report of the High-level Panel on Threats, Challenges and Change concerning the reforms of the SC. These include e.g. that the SC should increase the democratic and accountable nature of the body. The SG states that it is of vital importance, not only to the organisation, but also to the world, that the SC should be equipped to carry out responsibility for the maintenance of international peace and security and that its decisions should command worldwide respect. [163]

### 6.2.4 The outcome of the Summit

Heads of State and Government reaffirmed, at the 2005 World Summit, their faith in the UN and their commitment to the purposed and principles of the Charter and international law, which are seen as indispensable foundations of a more peaceful, prosperous and just world and reiterated their determination to foster strict respect for them. The Millennium Declaration was reaffirmed as well as the fact that the common fundamental values, including freedom, equality, solidarity, tolerance, respect for all human rights, respect for nature and shared responsibility, are essential to international relations.[164]

The world's leaders agreed to take action on a number of global challenges. These were the decisions dealing with management reform, terrorism, human rights, and the rule of law:

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[159] *In Larger Freedom: towards development, security and human rights or all*, UN Doc. A/59/2005, para. 32, available at http://www.un.org./largerfreedom.
[160] Ibid., para. 133.
[161] Ibid., paras. 154-156.
[162] Ibid., para. 153.
[163] Ibid., paras. 167-169.
[164] *2005 World Summit Outcome*, UN Doc. A/RES/60/1.

- The leaders agreed that terrorism in all its forms and manifestations committed by whomever, wherever and for whatever purpose, was to be condemned by all governments for the first time, and that a strong political push for a comprehensive convention against terrorism within a year was to be made. They agreed to fashion a strategy to fight terrorism in a way that will make the international community stronger and terrorists weaker.
- They agreed on a clear and unambiguous acceptance by all governments of the collective international responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. For this purpose, they affirmed a willingness to take timely and decisive collective action for this purpose through the SC when peaceful means prove inadequate and national authorities are manifestly failing to act.
- They further agreed to take decisive steps to strengthen the UN Human Rights machinery, backing the action plan, doubling the budget of the High Commissioner and to establish a UN Human Rights Council during the coming year.
- They also agreed to reform management by broad strengthening of the UN's oversight capacity, expanding oversight services to additional agencies, calling for developing an independent oversight advisory committee, further developing a new ethics office and by updating the UN by reviewing all mandates older than five years, so that obsolete ones could be dropped to make room for new priorities.
- They decided to further reform management by a commitment to overhauling rules and politics on budget, finance and human resources so the organisation can better respond to current needs, and on a "one-time staff buy-out" to ensure that the UN has the appropriate staff for today's challenges.[165]

[165] Outcome of the 2005 World Summit, Fact Sheet, available at http://www.un.org/summit2005/presskit/fact_sheet.pdf .

# 7 The Consolidated List

The consolidated list of individuals and entities associated with Al Qaida, Usama bin Laden and/or the Taliban is designated by the Al Qaida and Taliban Sanctions Committee (hereinafter the Committee). The list can be found along with information on the Committee and its work on the UN's website.[166] Among the information provided on the website, are fact sheets on listing, de-listing, on the exemptions to the assets freeze and to the travel ban, and a fact sheet for updating the list. Also accessible are the Committee´s guidelines, standard forms for listing submissions and for de-listing requests, and further guidance documents for the member states. In addition, the site provides a collection of various reports, e.g. the annual reports of the Committee, reports of the SG and member states reports. The information accessible on narrative summaries of the reasons for listing is relatively new on the website. This information is not yet complete.[167]

## 7.1 The process of listing

The Committee's Guidelines were adopted on 7 November 2002, and has been amended on 10 April 2003, 21 December 2005, 29 November 2006, 12 February 2007 and lastly 9 December 2008, following the adoption of resolution 1822(2008), when several sections of the guidelines were restructured and redrafted, and Sections 9 and 11 were added. Section 9 concerns review of the Consolidated List and Section 11 concern exemptions from the travel ban.

In the Committee's guidelines it is stated that member states "*are encouraged to establish a national mechanism or procedure to identify and assess appropriate candidates to propose to the Committee for listing*".[168] The Committee considers including new names to the list based on these listing submissions received from the member states. The member states are encouraged to seek additional information by approaching the state(s) of residence and/or nationality of the individuals or entity concerned. States are *advised to submit names as soon as they gather the supportive evidence of association with Al-Qaida and/or the Taliban*. For inclusion on the Consolidated List it is not necessary that there is a criminal charge or conviction against the individual or entity concerned, *as the sanctions are intended to be preventive in nature*. However, member states *shall*, however, provide a detailed statement of case in support of the proposed listing that forms the basis or justification for the listing in accordance with the relevant resolutions. The statement of case should provide as much detail as possible on the basis for listing indicated above. This includes specific findings demonstrating the association or activities alleged; the nature of the

[166] See http://www.un.org./en/ → Peace and Security → Thematic Issues: Countering terrorism → Security Council → Counter-terrorism and related bodies.
[167] See 7.5.
[168] See also paragraph 9 of SC Res 1822(2008).

supporting evidence (e.g. intelligence, law enforcement, judicial, media, admissions by subject, etc.); and supporting evidence or documents that can be supplied. If an individual concerned has a connection with a currently listed entity, supporting evidence of this should also be included. It is stated that states *shall* identify those parts of the statement of case that may be publicly released, "*including for the use by the Committee for development of the summary [...] or for the purpose of notifying or informing the listed individual or entity of the listing, and those part that may be released upon request to interested States.*"[169]

The Committee considers proposed listings based on the "association with" standard described in SC Resolution 1617(2005) and as reaffirmed in SC Resolution 1822(2008). The Committee reaches decisions by consensus.

When a new listing has been made, the Committee shall, with the assistance of the Monitoring Team, make accessible on the Committee's website a narrative summary of reasons for listing for the corresponding entry or entries on the Consolidated List. After publication, but within one week after a name is added, the Secretariat *shall* notify the Permanent Mission of the country where the individual or entity is believed to be located and, in the case of individuals, the country of which the person is a national. In this notification, the Secretariat shall include a copy of the publicly releasable portion of the statement of case, a description of the effects of designation (as set forth in the relevant resolutions), the Committee's procedures for considering de-listing requests, and the provisions for available exemptions. The states receiving such notification *shall* in this notification letter be reminded of the fact that they are required to take, in accordance with their domestic laws and practices, all possible measures to notify or inform in a timely manner the newly listed individuals and entities on the Consolidated List of the measures imposed on them. The states are also required to inform the concerned individual or entity of the reasons for listing available on the Committee's website as well as all the information provided by the Secretariat in the above-mentioned notification.[170]

[169] That a statement of case shall be provided was established in paragraph 4 of SC Resolution 1617(2005) as reiterated in paragraph 5 of SC Resolution 1735(2006) and as reaffirmed in paragraph 12 of SC Resolution 1822(2008). Under paragraph 14 of SC Resolution 1822(2008), States are requested to provide the Committee with as much relevant information as possible. In paragraph 12 of the same resolution, it is stated that the States need to identify which parts of the information that may be publicly released.

[170] *Guidelines of the Committee for the Conduct of its work*, section 6, available at http://www.un.org/sc/committees/1267/fact_sheet_consolidated_list.sthml. See also paragraph 15 and 17 of SC Resolution 1822(2008).

## 7.2 The process of de-listing

A listed individual, group, undertaking or entity may submit a petition to request review of the case. A petitioner seeking to submit a request for de-listing can do so either directly to the Focal Point[171], or through his/her state of residence or nationality. By the publication of a declaration on the Committee's website, a state can decide that its nationals or residents should address their de-listing requests directly to the Focal Point. The petitioner should provide justification for the de-listing request by describing the basis for this request, including an explanation of why he/she no longer meets the criteria for listing.[172]

When receiving a request, the Focal Point verifies if it is a new or a repeated request. If it is a repeated request and no additional information has been added, the request is returned to the petitioner. Otherwise, the receipt of the request is acknowledged and the petitioner receives information on the general procedure for processing the request. Thereafter, the request is put forward to the designating state(s) and to the state(s) of nationality and residence, as these states are urged to review the de-listing request in a timely manner and indicate whether they support or oppose the request in order to facilitate the Committee's review. If a state recommends or opposes de-listing, it will inform the Committee of this. Any member of the Committee may after consultation with the designating state(s), recommend de-listing by forwarding the request to the Chairman, accompanied by an explanation. For the request to be put on the Committee's agenda, at least one Committee member must recommend de-listing. The Focal Point conveys the communication between member states, the petitioner and the Committee. If the request is submitted to the state of residence or nationality, this state should review all relevant information and then approach the designating state(s) to seek additional information and to hold consultations on the de-listing request. If the petitioned state wishes to pursue the request, it should seek to persuade the designating state(s) to submit jointly or separately a request for de-listing to the Committee. The Secretariat shall within one week notify the Permanent Mission of the country or countries where the individual or entity is believed to be located and, in the case of an individual, the country of which the person is a national, of a decision by the Committee to remove a name from the Consolidated List.[173]

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[171] *As part of its commitment to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists, and for removing them, as well as for granting humanitarian exemptions, the Security Council, on 19 December 2006, adopted resolution 1730 (2006) by which the Council requested the Secretary-General to establish within the Secretariat (Security Council Subsidiary Organs Branch), a focal point to receive de-listing requests and perform the tasks described in the annex to that resolution.* Information accessed at http://www.un.org/sc/committees/dfp.shtml .

[172] See paragraph 2of SC Res. 1617(2005), and paragraph 2of SC Res. 1822(2008)

[173] *Guidelines of the Committee for the Conduct of its work*, section 7, available at http://www.un.org/sc/committees/1267/fact_sheet_consolidated_list.sthml.

## 7.3 Review of the Consolidated List

A one-time review of all names that were inscribed on the Consolidated List as of 30 June 2008 shall be conducted by the Committee by 30 June 2010, in accordance with a procedure laid down in the Committee's guidelines. Thereafter, an annual review shall be made by the Committee of all names that have not been reviewed in three or more years, in which relevant names are circulated to the designating states and states of residence and/or nationality, in order to ensure that the Consolidated List is as updated and as accurate as possible and to confirm that the listing remains appropriate.[174]

## 7.4 Updating the Consolidated List

In accordance with paragraphs 9 and 24 of SC Resolution 1822(2008), states are encouraged to submit names for inclusion as well as additional information on the listed individuals and entities. In addition to this information, the Committee also considers relevant information for updating the list submitted by international or regional organisations either directly to the Committee or through the Monitoring Team. Any changes in the list are immediately disseminated to the member states.[175]

## 7.5 Narrative summaries of reasons

It was by the adoption of SC Resolution 1822(2008), that the Committee was given the task to make accessible on the Committee's website, narrative summaries of reasons for listing for individuals, groups, undertakings and entities included on the consolidated list.[176]

According to the information given on the Committee's website, each narrative summary includes the date of listing and basis for listing according to relevant resolutions adopted by the SC. As appropriate, any other relevant information available after the date of listing that would be provided when conducting the review of the same name(s), and the names and reference number(s) of other entries on the List associated with the listed party are also provided for. The narrative summaries are based on information available to the designating state(s) and/or members of the Committee at the time of the listing. The information contained in each narrative summary is presented as far as possible in chronological order. The date on which the narrative summary is made accessible on the Committee's website is also specified in the document containing the summary.

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[174] *Guidelines of the Committee for the Conduct of its work*, section 9, available at http://www.un.org/sc/committees/1267/fact_sheet_consolidated_list.sthml. See also paragraph 25 of SC Resolution 1822(2008).

[175] http://www.un.org./sc/committees/1267/fact_sheet_consolidated_list.shtml

[176] See SC Res 1822(2008) paragraph 13.

At the moment of writing, 89 narrative summaries of reasons for listing are posted. Many more individuals and entities are however on the list.[177]

- No entity is listed for association with the Taliban.
- No summaries of the reasons concerning individuals associated with the Taliban has been made accessible yet.
- Seven summaries concern entities and other groups and undertakings associated with Al-Qaida, and they were posted on 8 July 2009 and 13 August 2009.
- The remaining 82 summaries concern individuals associated with Al-Qaida. The first of these narrative summaries were posted on 9 March 2009. More summaries were posted on 6 April 2009, 7 May 2009, 21 May 2009, 22 June 2009, 8 July 2009, 23 July 2009 and the latest on 13 August 2009.

[177] Latest update of the Consolidated List made on 10 August 2009. Information concerning the narrative summaries accessed on 19 May 2009. Information accessed concerning the number of narrative summaries last updated on 15 August 2009.

# 8 Analysis of the developments

"*For the rule of law, if it means anything, embodies commitment to political ideals that apply in times of quiet but also - though it may tie our hands and frustrate our desire for action - in times of crisis.*" [178]

- Simon Chesterman

## 8.1 What are we dealing with?

The sanctions imposed against individuals and entities associated with Al Qaida, Usama Bin Laden and/or the Taliban, are sanctions measures against terrorism. Terrorism is a crime and a merciless form of warfare, one that the international community will not tolerate. Nor will the international community tolerate collateral damage and humanitarian suffering caused by comprehensive sanctions issued against these actions, however merciless and abominable they might be.

The use of force is not the primary option in this situation. First of all, the Charter proclaims a non-violence principle. Conflicts are to be solved by peaceful means as far as it is possible. The use of force is a derogation to be exercised when peaceful means prove unsuccessful.[179] In the case of Haiti, Chesterman et al. suggested that the use of force from the start might have proved more efficient. Such a conclusion is, however, made with the hindsight of history and is not so easily foreseen. Even though speculations are a part of politics, when resorting to use force, we should be wary of too much speculation. If we abandon the non-violence principle, we would surely use force in situations where it would otherwise have proved unnecessary. Secondly, the threat in itself and perhaps even more the enemies behind the threat, are rather elusive. As we have adopted a world of states, the principle of sovereignty is strong, and complex circumstances surround the conflict of interest between the extremist responsible for the terrorist actions and threats, and the parts of the world which they fight. Primarily, we will not solve that conflict by using force. On the contrary, such a war has catastrophic potential, and as SG Kofi Annan stated in 2005, we must ensure that "*catastrophic terrorism never becomes reality*".[180] Therefore, the international community has decided to fight terrorism proactively by *inter alia* using sanctions. By means of sanctions, the community is trying to change the behavior of terrorists and to keep the threat of terrorism at bay without having to use force. Considering that the threat is not concentrated to a particular state, or to a concentrated group of people all located in the same region, it makes it of course even more complex to structure such sanctions. As I have described in this thesis, the international community decided to identify, by united efforts, the

[178] Chesterman *'I'll Take Manhattan': The International Rule of Law and the United Nations Security Council*, New York University, Public Law Research Paper no. 08-67.
[179] Articles 2(3) and 2(4) of the UN Charter.
[180] See 6.2.1.

responsible individuals, entities, groups and undertakings, in an effort to make those responsible for the threat and/or acts of terrorism the subjects of the sanctions without involving innocent third parties. Three main actors are singled out, the Al Qaida network, the Taliban, and Usama bin Laden, the prominent figure of the Al Qaida network who claimed responsibility for the attacks of 11 September 2001. Thereafter, individuals and entities associated with these main actors were listed to be subjects of the sanctions measures imposed by the SC. To cut off the terrorists' funds is considered a logical and effective solution to prevent further terrorist attacks, but the process of making these financial sanctions clear and just has not been carried out without problems.

## 8.2 Refining the use of targeted sanctions

Three large actions that have been initiated by members of the UN in order to refine the use of sanctions are the Interlaken Process, the Bonn/Berlin Process and, finally, the Stockholm Process. At the time of the Interlaken Process, the use of more targeted sanctions had not yet been as questioned as they would become. The focus lay on how to avoid the use of comprehensive sanctions and how to limit humanitarian suffering by developing the technical requirements of targeted sanctions necessary in order to make them effective enough. The Bonn/Berlin Process was also focused on the effectiveness of the sanctions. However, the Stockholm Process was initiated in November 2001, two months after the 11 September attacks, and just after the adoption of Regulation (EC) No 2199/2001 which, for the fourth time, amended Regulation (EC) No 467/2001. The regulation added numerous entities and individuals to the EU's list over entities and individuals subject to the EU's implementation of the sanctions measures imposed by SC Resolution 1267(1999) and SC Resolution 1333(2000). This new listing caused the debate on how the international community was responding to the threat of terrorism to grow, especially among lawyers and the public in Europe. Among the individuals listed were three Somali-Swedes resident in Sweden, and it is possible that the debate and media focus in Sweden put pressure on the Swedish Government to contribute to scrutinizing and refining the targeted sanctions regime and in particular the listing process.

In the Stockholm Process Report the *need* for sanctions is stressed and it is stated that targeted sanctions are *necessary* since the SC *must* have at its disposal the means to react and address situations that threaten international peace and security, *other than* military action or declaratory statements. In addition, it is stated that targeted sanctions can be less costly than military options and that they reduce the humanitarian impact. In comparison to the earlier processes, the report addresses the issues of listing and pays attention to the fact that it is important that those targeted actually are responsible for the policies, and that they remain so throughout the listing period.[181] To use the word "important" regarding this is, in my opinion, a weak terminology. I

[181] See 5.3.

believe it is crucial, not just important. However, the terminology "crucial" is used concerning the requirements necessary for the *effectiveness* of the sanctions. In my opinion, this choice of words insinuates that the focus is still primarily on the effectiveness of the sanctions. However, considering that there was no focus on the issue of accurate targeting in the earlier processes, it was nonetheless a step forward.

The Stockholm Process Report also notes that among the problems identified in the targeting element is the fact that "*targeted actors are likely to utilize a range of strategies before and after sanctions are implemented*". This would include *inter alia* justification of their evasion of sanctions on human rights grounds, and using propaganda and/or media campaigns to make arguments justifying their evasion of sanctions and objections to sanctions. Another problem identified is that member states may be reluctant to implement mandated sanctions if they are seen to be overly broad, or to conflict with country-specific legal rights of their citizens/residents.[182] Described like this, the human rights issues seem primarily to be considered a *problem* for the *effectiveness* of the sanctions, and that approach is to my mind worrying and something to be wary about.

The UN High Commissioner for human rights, Louise Arber, observed in a keynote speech in 2006 that: "*the strength of our rule of law and human rights norms can only be measured by weather they can resist the temptations to surrender to fear in times of crisis.*"[183] Tomuschat states that this sentence contains the challenges which the Western democracies must overcome in order to remain faithful to their basic tenets.[184] And concerning the use and development of targeted sanctions I am obliged to agree. Regarding the way the human rights issues are described in the Stockholm Process Report, it seems like he is right. Louise Arber also states, in the same speech, that: "*All law enforcement systems operating under the rule of law are limits to the power of governments to investigate, apprehend, prosecute and convict persons suspected of crimes. […] rules [...]* ***are a bar to the absolute efficiency of a system that, if absolutely efficient, would be absolutely tyrannical.*** *Transposed into the international realm where true tyrants (war criminals, terrorists) are targeted for prosecution,* ***the national norms of restraint may sometimes appear less necessary, less appropriate, less attractive***".[185] (My emphasis)

Even though the issues concerning the listing are presented as an obstacle to effectiveness, the report does recommend clear justification, transparency, and speed, regarding selection of individuals, groups and entities for listing, which reflects principles of due diligence. The report also suggests introducing the possibility of *administrative or judicial processes* (e.g.

[182] See 5.3.
[183] Address by Louise Arber, UN High Commissioner for Human Rights, at Chatham House and the British Institute for International and Comparative Law, 2006.
[184] Tomuschat *supra note* 11, p. 68.
[185] Address by Louise Arber, *supra note* 183, 2006.

regular reviews of names on the list) that fulfill ordinary expectations of due process *to address mistakes that may occur* in listing and to take into account compliance or changed behavior by listed individuals and entities. The report also recommends disseminating up-to-date lists as widely as possible via the Internet on the websites of the Sanctions Committees as well as through other public outlets, and traditional media channels such as radio and television, and through efforts of Member States. The Stockholm Process Report was presented to the SC on 25 February 2003.[186]

Further improvements of targeted sanctions were presented in the white paper prepared by the Watson Institute in 2006. Among these were the need to establish a Focal Point to handle all de-listing and exemption requests. It is also suggested that a biennial review of the listings should be established, and that the transparency of committee practises should be increased through improved websites, more frequent press statements and a broader dissemination of Committee procedures. The paper suggests further that some form of review mechanism is established, to which individuals and entities may appeal decisions regarding their listing. A number of options for a review mechanism are suggested, including a review mechanism under the authority of the SC for consideration of de-listing proposals, and creating a Panel of Experts to hear requests.[187]

The symposium held in April 2007 on the enhancing of the implementation of UN Sanctions can possibly be seen as some kind of evaluation and "defense" of the use of targeted sanctions. The spirit seems overall positive, and it is quite obvious that both the UN Organisation and its Members unite behind the use of targeted sanctions. It is concluded though, that challenges remain and that needed reforms include *additional progress in listing and de-listing procedures to ensure that human rights and due process are addressed*.[188]

As described in the previous chapter there is a possibility for listed individuals and entities to submit a petition to request review of the listing. Resolution 1822(2008) also established that an annual review shall be made by the Committee of all names that have not been reviewed in *three or more years*. The reviews possible are, however, carried out by the Committee, and are based upon the reviews and the support or objections by the Member States. *There is still no possibility to appeal a listing decision to an independent judiciary*.

An independent judiciary belongs to the core elements of the rule of law, and I believe that the establishment of such a judiciary regarding listing decisions is vital for the acceptance of targeted sanctions. The Al Qaida and Taliban Sanctions Committee is a subsidiary committee to the SC, a political organ, which *does not* fulfil the judiciary element of the rule of law.

[186] See 5.3.
[187] See 5.4.
[188] See 5.5.

Regarding the recommendation to disseminate up-to-date lists via the Internet and to increase the transparency through improved websites, changes have definitely been made. The entire UN Website was recently transformed and today contains a vast amount of information, *inter alia* concerning the process of listing individuals and entities associated with Al-Qaida, Usama bin Laden and/or the Taliban.

To conclude, while recommendations on the improvement of listing procedures were presented to the SC through the Stockholm Process Report in 2003, and later by the white paper in 2006, in 2007, there still challenges to be dealt with. Notable changes were however brought about through the adoption of resolution 1822 in 2008, although it took seven years after the concerns were addressed in the Stockholm Process.

## 8.3 A state of emergency?

Could the members of the UN, who are obliged to fulfil the SC sanctions resolutions, be considered to be in a state of emergency in accordance with Article 4 §1 ICCPR and can derogate from certain human rights provisions? Qualifications to be considered are the nature of the emergency, any official declaration, necessity, international law obligations and notifications.[189]

Let us stipulate that some countries be in such a state. Would that justify the human rights protection deficiencies of the sanctions measures? First, the HCR has stated that the circumstances surrounding the derogation from human rights provisions must be exceptional and carefully weighed, and any derogation must be strictly limited in time and substance and be subject to regular review. Further, the process of adopting derogations must be consistent with established national and international procedures. The Committee has also underlined that the right to a fair trial is explicitly guaranteed under international humanitarian law, especially the Geneva Conventions, during armed conflict. Derogations from fair trial guarantees during other emergencies can therefore not occur. In other words, it would prove difficult to argue for derogation from the right to a fair trial. I do not believe a derogation would be considered consistent with the requirements necessary, such as strict limitations in time and substance, even if it were possible. Even though some states could argue that they had the right to e.g. interfere with the targeted individuals' privacy (Article 17 of the ICCPR) this would not have been done in accordance with the requirements of derogation. One can easily conclude that the requirements have not been fulfilled.

The HRC has, however, also stated that exceptional circumstances allow for the limitation of some rights for legitimate and clearly defined situations other than emergencies.[190] In this situation, it is important to take into

[189] See 3.1.1.
[190] Ibid.

account the principles of necessity and proportionality, which must always be taken into consideration. The measures must also be appropriate and the least intrusive option to achieve the objective. This statement opens up for discussion; that the circumstances were so exceptional after the terrorists attacks in 2001 that limitations of some rights were necessary; that the elusive and potentially devastating threat which faced the world made the limitations proportionate in relation to the impact of the sanctions for the individuals; that targeted sanctions were appropriate since there were no other options besides comprehensive sanctions or military force, both of which were considered to be more "intrusive".

If this situation existed it cannot have endured long, and actions should have been carried out to adapt the limitations. However, it seems the sanctions which had been imposed and the lists which had been made were considered legitimate, and impossible to withdraw once they were made. Compared to the scenario of these limitations never being adjusted we should be thankful of the fact that they have been. However, the legal framework and humanitarian standards which the international community has created during the past decades cannot, in my opinion, tolerate a situation where people are being subject to sanctions without the possibility review by an independent judiciary. This kind of limitation must be introduced promptly.

## 8.4 Concluding remarks and thoughts

The world has changed since 1945. The protection of human rights has grown to become a fundamental core of international law, which has gradually become more respected and promoted by the international community, and is also one of the core purposes of the UN. Even though the protection of human rights was promoted by the UN in 1945, they were not then as strongly anchored as they are in the international community today. A strong belief in these fundamental rights has emerged, and naturally the UN had to develop accordingly. Today, human rights are included as a substantive component in the UN conception of the rule of law. How well this conception has been promoted and upheld is, however, questionable.

While the sanctions regime has been very much used by the SC, it has also been heavily debated and criticised. Humanitarian aspects caused the emergence of so-called smart sanctions, and lead to a frequent use of targeted sanctions. The process of targeting has improved over the years. However, considering the impact that the sanctions can have on a listed individual, the improvements did not happen very fast, and all elements of change have not yet been put into practice. The "Al Qaida and Taliban Sanctions Committee", for instance, was established in 1999. Almost every individual currently listed for being considered associated with the Taliban were listed in January and February 2001. No summary of reasons for listing has yet been made accessible regarding these individuals. In addition, there is not much information revealed on the Consolidated List. Most of the individuals currently associated with Al Qaida were listed following the attacks on the USA on 11 September 2001. Only a few, including Usama

bin Laden, were listed before the attack. Most of these were close associates to Usama bin Laden. Narrative summaries of reasons for the listing of individuals associated with Al Qaida were first published in 2009. However, narrative summaries of reasons for listing have not yet been made accessible regarding *all* listed individuals and entities, by far. Many of the first narrative summaries published concerned individuals listed in 2008.

One can speculate about the reasons why the information is published inconsistently; if it depends on the member states' willingness or unwillingness to agree on the publishing of the information, or if it has to do with how much or how reliable information they really have? Did the majority of the first summaries published concern individuals listed in 2008 because the international debate had perhaps reached its peak, drawing attention to the legality of the listing process and demanding change, and because of the adoption of resolution 1822(2008), which made the member states more thorough in their submissions for listing? If so, one can speculate about the listing processes prior to 2008. But that is also all most of us can do, speculate. These speculations are dependent on our trust in the SC Committee. The whole concept of this listing process has to a great extent relied upon trust, since very little information has been released, and as this trust diminished, skepticism, and perhaps even cynicism, grew, leaving people suspicious. This leads to an even greater need for transparency and justification of the material which is now gradually presented.

All the cases that have been brought before the CFI and the ECJ have fed the debate, and probably contributed by putting well needed pressure on the UN to improve. Even though one can conclude that actions have been taken by the UN and its members, that decisions have been made in order to improve and remedy the deficiencies of targeting, it can be questioned whether that is enough. Could one require that the UN should have been aware of at least some of these deficiencies beforehand? Should these have been considered? Or at least, should the UN and the international community have acted faster and with greater force once they attended to the legal concerns of the process? The co-operation of the international community is certainly a great operation, but considering the impact the sanctions may have on an individual, a faster approach would have been desirable.

In their defense, the SC was much restrained during the Cold War, and it was not until the 1990's that the SC could start using its powers more freely. During the following decade the SC endeavoured to maintain international peace and security primarily without the use of force. By the end of the 1990's, so-called smart sanctions had been developed. At the same time several terrorist attacks, perhaps most notably the embassy bombings in 1998, had taken place. The UN and its members could not agree on a common assessment of the threat that was facing the international community, and while facing disagreements on how to address this threat, the UN was also facing challenges in reforming the Organisation. Targeted

sanctions had been imposed several times during the 1990's and the sanctions were considered successful, so it was probably natural to impose targeted sanctions against the Taliban, Al Qaida, and Usama bin Laden, and their associates.

The attacks on 11 September brought the attention of the public to the issue, and as the attacks were so horrifying and so shocking, it induced a strong fear in people. Action was demanded instantly, and at the same time, the UN and the governments of the world were fumbling in the dark. The rule of law is in this context a mere principle. The psychology of a world population cannot be completely protected by a theoretical legal ideal. However, the more respected and the better incorporated the rule of law is, the stronger will the protection that can be enjoyed and attained from it be.

To demand solutions completely without flaws is unrealistic. As a consequence, solutions should not be embraced blindly. As the world is ever-changing and as we are always adapting, making new rules and norms as we go along, we also abolish old ones. Provisions might become obsolete and unwanted because they are not functioning as they once were intended due to a change of conditions. It might also be that they lead to inappropriate consequences, which are not proportional to the objective of the provision. This is what faced the UN and the sanctions regime. Perhaps the solutions that were brought by the UN and its Members to some extent and for some time, actually were accepted without further considerations?

On the other hand, sanctions were hardly used before the 1990's and it takes the experience of actually using a legal instrument to improve and refine its structure. The use of comprehensive sanctions came to cause much humanitarian suffering, and the targeted sanctions were lacking in many respects, and it took a long time to make the decisions necessary to improve them. In this sense, people became victims of the evolution of law. This is *greatly* unfortunate and questionable. I want to believe that more could have been done to avoid innocent victims, and that what was done could have been done in a better and faster way. At the same time, will it ever be possible to eliminate that risk; are a number of *possible* innocent victims a small price to pay? Perhaps, for the individuals no, but for the international community yes? In harsh reality, it is a utilitarian choice. By contrast, it must also be considered that among those listed are Usama bin Laden and close associates of his, directly responsible for several terrorist actions that took the lives of thousands of people. However, even though terrorism is considered a crime, and even though the protection of human rights cannot go as far as restraining the international community from acting against criminals and protecting and maintaining international peace and security, human rights and other provisions should restrain the way in which these threats are approached. In addition, as we must strive to avoid innocent people becoming victims of the slow evolution of laws, we must also develop defence mechanisms *if* innocent people do become victims. Here, the sanctions regime lagged behind, and is still lagging. Political interests and powers need to be balanced by judicial elements.

Finally, I want to call attention to the high standard the UN has set up for its conception of the rule of law, as it includes substantive rights.[191] The conception might look good in theory, but at the same time scholars encourage us to be wary of the talk of the rule of law as a political ideal which might be empty.

I believe that if the rule of law was separated from substantive elements it would be easier to know what was meant with the term, and it would be easier to see what is upheld and what is not. Then we would have a root which can become the basic and necessary foundation for the substantive elements we choose to protect *with* the rule of law, not *within*.

To conclude, the view which the international community has on the use of targeted sanctions seems to be that targeted sanctions are necessary, as they offer a better option than the choice of comprehensive sanctions, and since today there really is no other option effective enough to achieve the desired results. The UN and the international community intend to use sanctions in the future, and I hope that future regimes will live up to the standards of the rule of law from the beginning. I also hope that present regimes will continue to be improved. Great concerns have been expressed over the years and the UN and its members responded to these, however, arguably, too slowly. The lack of options might perhaps have slowed down the refinement process. Regardless, there are still great achievements to be expected from the UN.

[191] See 3.1.2.

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